

OPINIONS
OF THE
Corporation Counsel and Assistants
OF THE
City of Chicago
FROM
April 16, 1923 to April 15, 1929

VOLUME XVII

SAMUEL A. ETTELSON
Corporation Counsel

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CHAMPLIN-SHEALY COMPANY, CHICAGO



CORPORATION COUNSEL OF CHICAGO

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(No. 6196—April 16, 1928—J. W. B.)

NAVY PIER CONCESSIONS.

Concessions on the Navy Pier can be awarded only in pursuance to advertisements for bids, the submission to the City Council of a contract signed by the successful bidder, the concurrence of a majority of the elected members of the City Council and the execution of said contract by the Commissioner of Public Works.

Hon. Richard W. Wolfe, Commissioner of Public Works:

We are in receipt of your oral request for an opinion as to your right to award a contract for the sale of food and non-alcoholic drinks on the Navy Pier.

In reply, we beg leave to advise you that sections 17b and 17c of paragraph 1178, chapter 24 of the Cities and

Villages Act, page 557, Cahill's Statutes of 1927, provide as follows:

"In connection with the use of any portion of such utility for recreation purposes, as specified in the previous section hereof, every such city and village shall, also, have the right, power and authority and such right, power and authority, are hereby granted to provide, by lease or contract, for the sale in or on such utility of food, non-alcoholic drinks and merchandise and for the giving in or on such utility of dances, concerts, exhibitions and other entertainments and for check-room privileges incidental thereto: *Provided, however*, that each such lease or contract shall be terminable by such city or village, either with or without compensation therefor as may have been therein stipulated, upon reasonable notice, whenever in the judgment of the corporate authorities of such city or village the transportation necessities shall make such termination desirable: *And, provided*, furthermore, that no such lease or contract shall be entered into for a period exceeding five (5) years except in conformity with the provisions of section 11 of this Act.

"Every power, right or authority which by this Act is granted to or conferred upon any such city or village, may be exercised by the concurrence of a majority of all the members elected in the City Council of such city or village."

Under the power conferred upon the City under the above sections of the statute, you have the right to advertise for bids for the restaurant concession on the Navy Pier and to award the contract subject to the concurrence of a majority of all the members elected to the City Council.

The way for you to proceed is to award the contract and then have a contract prepared and signed by the successful bidder, and transmit the same to the City Council for its concurrence therein, and for authorization for you to execute the said contract on behalf of the City of Chicago.

(No. 6197—April 18, 1928—E. C. H. et al.)

1 STREETS AND ALLEYS, SHERMAN HOUSE.

The alley extending from La Salle street to the Sherman House and north to east and west is not a public but a private alley created for the use of the adjoining property owners who have a vested easement in it according to their rights under a certain partition proceeding.

2 COMMON LAW DEDICATION, ESSENTIALS.

To constitute a common law dedication there must be (1) an intention to donate specific property by its owner; (2) an acceptance of the property by the public; and (3) proof of a clear and satisfactory character.

3 STREETS AND ALLEYS, COMMON LAW DEDICATION, PROOF.

Clear and convincing proof is necessary to change a private alley to a public one under a common law dedication or prescription.

4 STREETS AND ALLEYS, FAILURE TO TAX, DEDICATION.

The failure to levy a tax against an alley does not change its status or character as a private alley for the reason that the assessing officer does not represent the public in the acceptance of a dedication.

5 STREETS AND ALLEYS, ASSESSOR'S PLAT, DEDICATION.

The designation of an alley as "public" upon an assessor's plat does not make it a public alley because the assessor has no power to establish alleys on behalf of the City or its people.

6 STREETS AND ALLEYS, CONTINUED USE, PRESUMPTION.

The continued user of an alley by the public, although creating the presumption that there is a grant to the public is insufficient to change a private alley to a public one if the actual grant is of a private alley alone.

7 STREETS AND ALLEYS, EASEMENT BY PRESCRIPTION.

The use and enjoyment of an easement by prescription must be open and notorious, under uninterrupted and exclu-

sive claim of right with the knowledge and acquiescence of the owner of the easement and adverse to him.

8 CONVEYANCES, EASEMENT.

A conveyance which omits to include the right to use a private alley adjoining the lot conveyed does not change the character of the alley nor deprive the grantor of its use as a private alley.

Hon. Charles C. Fitzmorris, City Comptroller:

In compliance with your request to investigate the question as to whether the alleys in the property at the north-east corner of Randolph and La Salle streets, upon which the Hotel Sherman Company is now constructing a building, are public alleys within the control of the City of Chicago, or merely private alleys for the use and benefit of the adjoining properties, and to report our opinion thereon, we submit the following:

In the first place we desire to say that in our investigations we have considered the question only as to the rights of the City of Chicago in the alleys in question without reference to the state of the title as to the other parties or as to whether the Sherman Hotel Company is now vested with a clear and merchantable title to said alleys. If the City, as trustee for the public, has no right, interest or claim to the alleys in question, it is no concern of the City as to whether the Sherman Hotel Company has title or in how many claimants the title vests. That is solely a matter for those claiming interests in the fee to settle among themselves or have cleared up in whatever way they may choose to adopt.

The legal description of the alleys in question is as follows:

The alley running east and west and north and south through Lot Five (5), in Block Thirty-four (34)

in the original Town of Chicago, in Cook County, Illinois, as shown on the plat of Commissioners' Partition of said Lot Five (5), in Case No. 3981, Circuit Court, Cook County, Illinois, shown as No. 30, in the Abstract of Title.

FIRST: AS TO THE RECORD EVIDENCE. The abstract of title shows that on July 27, 1843, a suit, entitled *Gallagher v. Mallaby*, Case No. 3981, was filed in the Circuit Court of Cook County for the partition of Lot Five (5) in Block Thirty-four (34), mentioned in said description, and a report of the Commissioners making the partition, was duly made, accepted and confirmed by the court.

As a part of their report the Commissioners attached a plat showing the respective allotments of Lot Five (5), to the parties to the suit. The plat also shows the alleys in question with the east and west one marked "Alley ten (10) feet wide," and the north and south one marked "Alley ten (10) feet wide."

The west and north ends of the respective alleys are shown on the plat to be closed.

The Commissioners in their report making the partition to the respective owners set off to Justin Butterfield, what is now known as Lot Nine (9) of the Assessors' Division "with the use in common with other owners of said lot of the alley aforesaid." They set off to Francis Mallaby what is now known as Lots Eleven (11), Twelve (12), Fifteen (15), and Sixteen (16), of the Assessors' Division "together with the right to use in common with other owners of the alleys shown on said plat"; to George W. Merrill what is now known as Lot Ten (10), of the Assessors' Division without reference to the use of the alley; and to Joseph S. Gallagher Lots Thirteen (13) and Fourteen (14) of the Assessors' Division without reference to the alley.

An examination of the Commissioners' Report and attached plat in the aforementioned partition suit (dated November 24, 1843), clearly indicates that the alleys in question were not laid out as public alleys for the general use of the public, but were created merely for the private use and benefit of the respective owners of property adjoining the same, and that each of said property owners was vested with an easement in and to said alleys, as thus shown on the plat, with the fee thereof in the original owners of said lots, as tenants in common according to their respective interests as defined in the partition proceedings. These rights of easement attached at least to the lots set off with express grants, as to the use of the alleys, and these grants clearly established the character of the alleys as *private* and not *public* alleys.

In 1866 there was a resubdivision of said Lot Five (5), with Lot Four (4), for taxation purposes, as shown by a map entitled "Assessors' Division of Lots Four (4) and Five (5), Block Thirty-four (34), Original Town of Chicago," and recorded September 19, 1866, as Document No. 123170. In this map the lots set off to the respective owners in said partition suit are for the first time given numbers, as above indicated. In this map the said ten-foot alleys are shown with dotted lines at the north and west ends of the respective alleys, indicating said alleys to be closed at those ends, as they appear in the plat in the partition proceedings. They are not designated on the map as either "public" or "private" alleys.

It would appear, therefore, that in making the Assessors' Resubdivision of the property in question these connecting alleys were regarded as private and not public alleys; but even though it were to be assumed that in the said "Assessors' Division" it was intended to convert them into public alleys, such intended purpose would be wholly ineffectual.

This was very clearly pointed out in the case of *City of Chicago v. Borden*, 190 Ill. 430, at page 447, where counsel for the City of Chicago referred to the Assessors' plat or subdivision as indicating that the alley appearing thereon was a public alley. The court in holding that this was of no consequence says:

"One of the circumstances referred to is the making in 1863 of the Assessors' plat or subdivision and marking what is called an alley thereon, as indicated in the statement preceding this opinion. The strip of ground ten feet in width is marked upon the map of this Assessors' Division 'open at the south end and closed at the north end,' but there is nothing upon the face of the plat which indicates that this strip was regarded as a public alley or as an alley of any kind. *But however this may be, the Assessor in making the plat did not represent the City of Chicago or the people, and could not by any act of his create a highway. No such authority was conferred upon him. Hamilton v. Chicago, Burlington & Quincy Railroad Co., 134 Ill. 235.*"

It is thus seen that whatever view may be taken of the Assessors' Resubdivision of said Lot Five (5) as indicating these alleys to be public alleys, their character as private alleys, established by the Commissioners' Report and attached plat in the aforesaid partition proceedings, was not in any manner changed, and the alleys still continued on the records as private alleys.

It also appears in the records of mesne conveyances of lots abutting on these alleys, that in some instances reference was made to the right of use of the alley and in other instances no reference whatever was made to the alley or the right to use the same. The failure to include in some of the conveyances of adjoining lots the right of use of the alley does not in any manner change the character of the alleys or even forfeit the rights of the mesne grantees in the use of the same. The easement appurtenant to the

lots, as shown by the Commissioners' Report and plat, would pass with the lots under the law by successive conveyances without express mention in the deed or deeds of such easement. As said by our Supreme Court in the *City of Chicago v. Borden*, 190 Ill. 430, at page 441:

"It was not essential to the enjoyment of the easement in the alley by the purchasers of the lots abutting thereon, that the alley should have been mentioned in all their deeds, because incorporeal hereditaments, appendant or appurtenant to land, pass by conveyance of the land, to which they are conveyed, without mention of the appurtenances. 'A private way, appendant or appurtenant to land conveyed, passes with the dominant estate as an incident thereto.' 19 Am. & Eng. Ency. of Law,—1st ed.—p. 110; *Clarke v. Gaffeny*, 116 Ill. 362; *Kuecken v. Voltz*, 110 *id.* 264; *Garrison v. Ruud*, *supra*; *Lide v. Hadley*, 36 Ala. 627."

Our conclusion is that the alleys in question were originally created and laid out as private alleys for the use and benefit of the owners of the lots abutting such alleys and that there is nothing in the records showing that said alleys were converted into public alleys by statutory dedication of the owners of the adjoining lots by condemnation proceedings or otherwise. This brings us to a consideration of the question as to whether the character of the alleys had become changed from private to public alleys by (a) a common law dedication, (b) by prescription. It may be noted that it appearing from the record of the Commissioners' Report and attached plat in the said partition proceedings that the alleys in question were private alleys, their character as such cannot be changed except upon clear and convincing proof.

SECOND: AS TO WHETHER THERE WAS A COMMON LAW DEDICATION. A common law dedication is based upon the theory of an actual donation by the owners and an accept-

ance thereof by the municipality. The donation and acceptance must be as real as in the case of a formal dedication spread of record, the difference in legal effect between the two is merely one of proof. In the case of a common law dedication there can be no acceptance by the City without an offer first being made by the owners. As said by our Supreme Court in *City of Chicago v. Borden*, 190 Ill. 430, at page 442:

“ ‘In order to constitute a dedication at common law, it is essential (1) that an intention on the part of the proprietor of the land to donate the same to the public use, and (2) an acceptance thereof by the public, be established by the evidence; and (3) that the proof as to these facts must be clear, satisfactory and unequivocal.’ *City of Chicago v. Chicago, Rock Island & Pacific Railway Co.*, 152 Ill. 561.”

In our opinion there is nothing in this case to indicate in any degree that the owners of the adjoining lots, to which is appurtenant the use of these alleys for their own purpose, at any time from the laying out of the alleys by the Commissioners in the partition proceedings down to the present time, did any act or pursue any course of conduct that could be construed as a donation of the alleys in question to public use. In *City of Chicago v. Borden*, *supra*, our Supreme Court, in discussing the elements of a common law dedication, said:

“The vital and controlling principle in a common law dedication is the *animus donandi*; and where there is no manifestation of intent on the part of the owner of the soil, either by formal declaration, or by such acts as should equitably estop him from denying such intention, to donate the land to the use of the public, it cannot be said that there is a valid dedication. * * * nor did the fact, that, during that period, Nickerson made no assertion of ownership to the ground embraced in the alley, indicate any intention to dedicate it to the public. ‘A dedication is not an act of omission to assert a right, but it is the affirma-

tive act of the donor, resulting from an active, and not a passive, condition of the owner's mind on the subject. A mere non-assertion of a right does not establish a dedication, unless circumstances establish the purpose or intention to donate the use to the public.' *City of Chicago v. Hill*, 124 Ill. 646; *Grube v. Nichols*, *supra*; *City of Chicago v. Chicago, Rock Island & Pacific Railway Co.*, *supra*."

Inasmuch as to constitute a common law dedication there must be an actual donation (although the same may be implied) from the owners of the lots to which the use of the alleys is appurtenant, the fact that in some of the mesne conveyances the use of the alleys was expressly conveyed indicates that there never had been a dedication of any kind of the alleys in question to the public use. In *City of Chicago v. Borden* (*supra*) the Supreme Court, in discussing this circumstance, said:

"The constant reference to the alley as a private alley by the various owners of the abutting property in their deeds negatives the idea, that there ever was any dedication of the alley, or offer to dedicate the same, as a public highway."

It may also be observed that while a continued user by the public of a highway for public travel may form a basis for a presumption of a grant of the highway to the public by the owners, the fact that these alleys were originally laid out as private alleys would overcome this presumption. As said by our Supreme Court in *City of Chicago v. Borden* (*supra*) at page 444:

"Where there has been user of a highway for a prescribed statutory period, a presumption arises from such user, that there has been a grant of the highway. * * * Such presumption is rebutted in the case at bar by conclusive evidence that the grant, made of the alley here in controversy, was the grant of a private, and not of a public alley."

There being nothing to indicate a common law dedication of the alleys to the public, the only remaining question to be considered is as to whether these private alleys were subsequently converted into public alleys by prescription.

THIRD: AS TO WHETHER THE CITY HAS ACQUIRED A RIGHT TO THE ALLEYS BY PRESCRIPTION. This method of creating a public way for public travel is closely allied to a common law dedication, and has some elements in common with it. As said by our Supreme Court in *City of Chicago v. Borden* (*supra*) at page 444:

“ ‘In order to establish a way by prescription, the use and enjoyment of what is claimed must have been adverse, under a claim of right, exclusive, continuous, uninterrupted, and with the knowledge and acquiescence of the owner of the land, in or over which the easement is claimed.’ *City of Chicago v. Chicago, Rock Island & Pacific Railway Co.*, *supra*; *Washburn on Easements*, 131; *Toof v. City of Decatur*, 19 Ill. App. 204; *Daniels v. People*, 21 Ill. 439.”

While the use of a way for the purpose of public travel must, in addition to other requirements, necessarily be open and notorious in order to lay any claim to a prescriptive right in the alley by the public, investigation does not reveal any evidence that these alleys were used as public thoroughfares for public travel therein; nor has the City during the many years these alleys have been in existence undertaken to exercise any power of control or dominion over them. However, the mere use of these alleys for the purpose of public travel thereon would not be sufficient to change the character of these alleys from private to public alleys. Their status as private ways for the use and benefit of adjoining property owners having become originally fixed by the Commissioners' Report and Plat in said partition proceedings any subsequent use

thereof by the general public in traveling over the same would not be sufficient of itself to convert the alleys from private to public alleys. As said by our Supreme Court in *City of Chicago v. Borden* (*supra*) at page 445:

“ ‘A mere permissive use of a way laid out as a private alley will not, of itself, transform it into a public alley.’ (Elliott on Roads and Streets,—2d ed.—sec. 25.) ‘A private way cannot be converted into a public highway by the use thereof by the public, no matter how long that use may be continued, but there must be a dedication and acceptance.’ 19 Am. & Eng. Ency. of Law,—1st ed.—107.

“*The use of this alley will be presumed to have been in accordance with the intention of the owners, and the intention of the owners was to make it a private alley for the use of the abutting owners.* In *Illinois Ins. Co. v. Littlefield*, *supra*, we said (p. 373): ‘The use will be presumed to have been in accordance with the intention of the owner, and when the way is opened as a private passway, and that fact clearly appears, it cannot be converted into a public highway by the mere use thereof, no matter how long that use may be continued.’ *Hall v. McLeod*, 2 Mete. (Ky.) 105; *Carpenter v. Gwynn*, 35 Barb. 395; *Dexter v. Tree*, 117 Ill. 532; *City of Chicago v. Chicago, Rock Island and Pacific Railway Co.*, *supra*; *Lambe v. Manning*, 171 Ill. 612; *White v. Bradley*, 66 Me. 258.”

The rule has been very clearly stated by our Supreme Court in the very recent case of *Jobst v. Mayer*, 327 Ill. 423 (Advance Sheets December 14, 1927). In that case the evidence clearly established the use of the alley for public travel and the supervision of the same by the City. To quote from the opinion of the court:

“Since the opening of the alley the public has, without hindrance and with the knowledge and consent of the owners and their tenants, continually used and traveled through the alley at will. About twenty years ago the city of Peoria installed and maintained at public expense an arc light in the alley, and city police officers have applied some of the traffic regula-

tions of the city to persons traveling through the alley.”

Our Supreme Court in the above case in denying the claim that the alley in question had become a public alley says:

“The principal contention of appellants is that the alley has become a public alley by prescription. To sustain this contention there must be proof of something more than mere travel by the public over the uninclosed lands. The user must be under a claim of right in the public and not by mere acquiescence on the part of the owner. A permissive use never ripens into a prescriptive right. To establish a highway or a public way by prescription the use must necessarily be under a claim of right, adverse, open, notorious, exclusive, continuous and uninterrupted for the statutory period. (*Gietl v. Smith*, 230 Ill. 467; *Doss v. Bunyan*, 262 *id.* 101; *Palmer v. City of Chicago*, 248 *id.* 201; *City of Princeton v. Gustavson*, 241 *id.* 566; *Chicago, Burlington and Quincy Railroad Co. v. Ives*, 202 *id.* 69.) There is no proof in this record that the user by the public has ever been adverse or under a claim of right. The fact that the plans for the fire-escape were approved by the commissioner of buildings of the city of Peoria, that the city maintained a light in the alley, and that its police enforced traffic regulations therein, did not alter or affect the legal character of the alley. It was a private alley when it was established, and nothing has occurred which deprives the owners of the fee or their right to control its use.”

It appears in this case that no assessments were made or taxes levied against these alleys by the taxing powers but that they have throughout the years been excluded from taxation, and the question arises as to whether this failure to levy taxes against the alleys in question does not impress them with the character of public alleys. The mere failure to levy taxes against the alleys could not in any manner change their character. The only effect such

failure could have would be to indicate that the official taxing bodies have not performed their official duty in levying taxes upon property which was legally subject to taxation. Our Supreme Court in the case of *City of Chicago v. Borden* (*supra*) disposes of this question at pages 447 and 448 as follows:

“In the latter case (*Hamilton v. Chicago, Burlington and Quincy Railroad Co.*, 124 Ill. 235) we said (p. 247): ‘The assessment or non-assessment of the premises we do not regard as material, as the assessing officers do not represent the public for the acceptance of dedications.’ * * * The easement, which the adjoining owners had in this alley, could not be taken away from them, either by the act of the assessor in not assessing the alley, or by the act of the owner of the ground, embraced in the alley, in not causing it to be assessed. * * *

Another circumstance, urged by counsel for appellant in favor of the public character of the alley, is the fact that it was not only never assessed, but that no taxes were ever paid upon it; and it is claimed that these facts show it to have been the intention of the parties that it should be a public alley. The city or the public cannot become entitled to a man's property because no taxes are assessed against it, and because, by reason of such non-assessment, no taxes are paid by the owner. If this alley was subject to taxation, it was the duty of the public officers to assess the same, and enforce the payment of taxes upon it.”

It also appears that in Case No. 49013, in the County Court of Cook County, brought by the City for the widening of La Salle street, a condemnation award in the sum of \$9,300 was made to the Hotel Sherman Co. as owner of “that part of private alley lying between Lots Nine (9), Ten (10), Eleven (11), Twelve (12) and Lot B; and Lots Twelve (12), Thirteen (13), Fourteen (14), Fifteen (15) and Sixteen (16) lying between the east line of North La Salle street and a line twenty feet (20 ft.) east of and parallel with the east line of North La Salle street.” The

condemnation award so ordered held awaiting owner's proof of title. It thus appears that in this case in which the City was a party and in which the character of this strip of alley (as to being private or public property) was necessarily involved, it was judicially determined that this alley strip so taken by the City was private property, for the taking of which the City was required to make compensation.

After a careful examination of the question submitted to us by you, we are of the opinion that the alleys in question are not public alleys, and that the City of Chicago has no right, title or interest in and to the same.

(No. 6198—April 19, 1928—A. H. V.)

1 RAILROAD CROSSINGS AND SUBWAYS, 91ST STREET AND SOUTH PARK AVENUE.

Under existing special ordinance, the Commissioner of Gas and Electricity may enter into a contract with the Chicago & Western Indiana Railroad Company for the lighting of the subway at 91st street and South Park avenue in the City of Chicago.

2 RAILROAD CROSSINGS AND SUBWAYS, LIGHTING.

In the absence of a general ordinance providing for the lighting of railroad crossings and subways, a railroad company cannot be compelled to install such lighting system.

Hon. Michael J. Kennedy, Commissioner of Gas and Electricity:

Your communication of the 3d instant relative to the installation of lights in the subway being constructed at 91st street and South Park avenue is at hand.

You refer to the opinion rendered by this office on March 19th, in which opinion we advised you that paragraph 2 of section 10 of the ordinance providing for the elevation of tracks by the Chicago & Western Indiana Railroad Company (C. P. 4398-4429, April 5, 1911) provided that said railroad is required to light the subways, passageways and grade crossings in the manner prescribed by ordinance for the lighting of railroad crossings in the City of Chicago. You now advise us that under date of June 30, 1925, the City Council passed an ordinance authorizing the Commissioner of Gas and Electricity to enter into contracts with various railroad companies providing for the proper and adequate lighting of subways and grade crossings in the City of Chicago. You asked whether this is sufficient authority to install an adequate lighting system in the subway in question and then collect from the railroad company.

The ordinance of June 30, 1925, to which you refer (C. P. 845-846) provides in part as follows:

“Section 1. That the Commissioner of Gas and Electricity of the City of Chicago be and he is hereby authorized to enter into contracts with the Chicago & Western Indiana R. R. Co. * * * providing for the proper and adequate lighting of the subways and grade crossings maintained by the various railroad companies and individual concerns listed above in the City of Chicago which these companies and concerns are under legal obligation to light in accordance with plans and specifications prepared by the said Commissioner of Gas and Electricity.”

Under the above quoted portion of the ordinance, the Commissioner of Gas and Electricity is given authority to enter into a contract with the Chicago & Western Indiana Railroad Company providing for the lighting of the subway at 91st street and South Park avenue. However, if the Chicago & Western Indiana Railroad Com-

pany refuses to enter into a contract, it can only be coerced in accordance with the contract ordinance of April 5, 1911. That ordinance provided that the railroad should light the subway in the manner prescribed by ordinance for the lighting of railroad crossings in the City of Chicago. This refers to a general ordinance providing for the lighting of railroad crossings. There is no such general ordinance in existence at the present time. It is our opinion that the only way in which the Chicago & Western Indiana Railroad Company can be legally obligated to light the subway in question is to pass a general ordinance providing for the lighting of railroad crossings and then to require the Chicago & Western Indiana Railroad Company to comply with said ordinance. If the company refuses to comply with the lighting requirements of said ordinance, the City of Chicago may then proceed to install the lights and charge the expense of installation to the railroad company, all as provided in paragraph 2 of section 10 of the ordinance of April 5, 1911.

If you desire to have a general ordinance introduced covering the lighting of railroad crossings in the City of Chicago, we suggest the following form:

Be it ordained by the City Council of the City of Chicago:

Section 1. That, except when otherwise provided by ordinances or council orders applying to particular locations or groups of locations, railroad crossings in the City of Chicago shall be lighted in accordance with the following specifications:

(Here insert specifications.)

Section 2. This ordinance shall be in force and effect from and after its passage.

In providing for specifications for lights in the above form of ordinance, it may be that different specifications should be inserted for the lighting of railroad crossings

where subways are employed, where viaducts are employed and where grade crossings are in existence.

After such a general ordinance has been passed, we are then of the opinion that if the Chicago & Western Indiana Railroad refuses or neglects to comply for a reasonable time after a written demand has been made to install lighting in accordance with the general ordinance, the City may then proceed to install the lights and collect the cost of installation of the same from the railroad company.

(No. 6199—April 21, 1928—F. J. V.)

1 COLD STORAGE WAREHOUSES, INSPECTION.

The City's right to inspect cold storage warehouses is implied from the general grant of the power to license and regulate under clauses 66 and 78 of section 1, article V of the Cities and Villages Act, but since the state has by legislative enactment (Cold Storage Act of 1917) assumed jurisdiction over warehouses, the municipal provisions on the same subject (article XXII of the Municipal Code of 1922) are inoperative and unenforceable.

2 CITIES AND VILLAGES ACT.

Clauses 66 and 78, section 1, article V of the Cities and Villages Act include the implied power to inspect cold storage warehouses.

3 UNIFORM COLD STORAGE ACT.

This act supersedes article XXII of the Municipal Code of 1922.

Albert H. and Henry Veeder, Chicago:

We have for answer your communication in behalf of your client, the Illinois Cold Storage Company, in the

matter of the collection, by the City, of fifty-six dollars (\$56), under warrant number F-10130, for the "Annual inspection fee for Cold Storage Warehouse for issuance of a certificate of registration for the period September 1, 1927, to August 31, 1928 (inclusive), as required by section 2031 of the 1922 Municipal Code of Chicago."

Your contention is that section 2031 of the Ettelson Municipal Code of 1922 is invalid on two grounds:

(1) That no power has been delegated to the City to license or regulate cold storage warehouses;

(2) That the State by legislative enactment of 1917 fully provides for licensing, regulating and inspecting cold storage warehouses. You cite the case of *Lowenthal v. City of Chicago*, 313 Ill. 190, to sustain both propositions. You ask that we kindly advise if we do not concur in your views.

It is true of cold storage warehouses, as is said of drug stores in the *Lowenthal case*, that "the Legislature has not, in so many words, conferred upon the City the right to regulate or license (cold storage warehouses)." But the power to license and regulate may be delegated by necessary implication from general grants of power as well as by express terms of such grants. There are numerous instances of the exercise of police power by license and regulation ordinances where the delegation of such power is not to be found in express terms, but which ordinances are sustained by virtue of the general grants of power in clauses 66 and 78 of section 1 of article V of the Cities and Villages Act, known respectively as the police power and public health clauses. Thus in sustaining an ordinance, licensing and regulating laundries, it is said in the case of *Moy v. City of Chicago*, 309 Ill. 342, at page 244:

“The ordinance is clearly a health regulation, and the City had authority, under paragraph 78 of the same section (1 of Art. 5, Cities and Villages Act) to pass the ordinance. That paragraph provides that the City shall have power ‘to do all acts, make all regulations which may be necessary or expedient for the promotion of health or the suppression of disease.’ This clause gives the City the power to compel any owner or occupant of a building to keep it in a sanitary condition and to conduct his business so that it will not endanger the health of the employes or the public. (*City of Chicago v. Pettibone & Co.*, 267 Ill. 573.) We have held that the City has authority, under this provision, to regulate the conduct of bakeries (*City of Chicago v. Drogasawacz*, 256 Ill. 34) and the distribution of milk. (*Koy v. City of Chicago*, 263 Ill. 122.) Under paragraph 66, which gives cities the power to ‘pass and enforce all necessary police ordinances,’ the city council is given authority to pass this ordinance to carry out the purposes of paragraph 78.”

In the *Lowenthal* case the Supreme Court said: “There is nothing about the conduct of a drug store requiring supervision which is not common to all stores where prepared foods and drinks are sold in packages or where stationery or other merchandise is sold” (p. 195). But there is a marked distinction between a drug store and a cold storage warehouse as affecting the public health. We believe, on the authority and reasoning of *Moy v. City of Chicago*, *supra*, that clauses 66 and 78 of section 1 of article V of the Cities and Villages Act sustain the ordinance for licensing, regulating and inspecting cold storage warehouses, as against your first proposition that there is no delegation of power to the City Council to adopt such ordinance. Things which may or may not be injurious to the public, according to the manner in which they are managed, conducted and regulated, may be licensed for the purpose of regulation. *Condon v. Village of For-*

est Park, 278 Ill. 218; *City of Chicago v. Murphy*, 313 Ill. 98.

It was decided, in the case of *North American Cold Storage Company v. City of Chicago*, 151 Fed. 120, that a "municipal ordinance passed under State authority, providing for the inspection of food products, kept within the City in storage or for sale, and authorizing the summary seizure and destruction of any 'putrid, decayed, poisoned and infected' articles of food found on such premises, is well within the police powers of the State, which are not affected by the fourteenth amendment to the Federal Constitution."

Although we believe the ordinance is otherwise valid, we are obliged to concur with you in your second proposition to the extent that the cold storage warehouse ordinance (article XXII, Ettelson's Municipal Code of 1922, p. 611) is inoperative and cannot be enforced in the face of existing State legislation on the same subject-matter.

The police power delegated to municipal corporations is not exclusive of that retained by the State. That is, municipal regulations must yield to the general laws of the State, enacted under the same power, whenever there is a conflict between them. (Black's Constitutional Law, p. 391, section 153.) This principle of constitutional law and the following decisions of the Supreme Court, the one cited by you and a stronger one of our own citation, are directly in point in establishing the proposition that in this case the existing State legislation must supersede and therefore render invalid and inoperative the ordinance under consideration. *Lowenthal v. City of Chicago*, 313 Ill. 190; *City of Chicago v. Burke*, 226 Ill. 191.

In the *Lowenthal case* the court, after enumerating certain State laws applying to the regulation and licensing of drug stores, said:

“In addition to the specific qualifications required of those operating drug stores, there are definite State regulations concerning the dispensing of harmful drugs only upon physicians’ prescriptions, so we think the conduct of the drug business, so far as it requires regulation is covered by State regulation.”

For this reason, as well as that there is nothing about the conduct of drug stores which is not common to all the stores, the court, in this case, held invalid the ordinance which sought to license and regulate drug stores.

In the case of the *City of Chicago v. Burke, supra*, it was expressly decided that:

“By the act of 1874, relating to oil inspection (Rev. Stat. 1874, p. 731), the legislature has resumed control over the subject and has taken away the authority of municipal corporations to legislate thereon under section 2 of article 6 and paragraph 54 of section 1 of article 5 of the City and Village Act of 1872.”

Here is a case of an express grant of power to the City to inspect oil, which is held invalid and inoperative to sustain an ordinance as against the State’s legislation on the same subject-matter.

So the cold storage ordinance in question, which would be valid by virtue of the public health and police power clauses of the Cities and Villages Act, must become inoperative and invalid by reason of the exercise of the same police power by the State itself. The Cold Storage Act of 1917 (Cahill’s Stat. 1927, ch. 56b, sec. 118, p. 1324) which covers the subject-matter and general provisions respecting cold storage warehouses, necessarily supersedes the ordinance under consideration. If any doubt remained as to the legislative intent, it must be dispelled by sections 13, 14 and 15, which provide (1) that “This Act shall be so interpreted and construed as to effect its general purpose to make uniform the law of those states which

enact it''; (2) that ''This Act may be cited as the Uniform Cold Storage Act''; and (3) that ''All Acts and parts of Acts inconsistent with this Act (are) hereby repealed.'' Such uniformity would be impossible with concurrent and conflicting city ordinances on the same subject.

This relation between the state and its municipalities in the matter of the exercise of the police power which has been delegated to the municipalities, is similar to the relation which exists between the Federal and State Governments on the subject of concurrent powers, such as that in bankruptcy legislation. The power of Congress to enact uniform laws on the subject of bankruptcy does not deprive the States of the power to pass laws dealing with the same subject when there is no national bankrupt law in existence. But as soon as Congress adopts a measure of this character all the State laws relating to bankruptcy or insolvency are thereby superseded and suspended until the national law shall be repealed. Black's Constitutional Law, page 260.

We are of the opinion, therefore, that the ordinance in question and the collection of the license fee thereunder, cannot be sustained.

(No. 6200—April 21, 1928—F. J. V.)

LAKE MICHIGAN, SHERIDAN AND ARDMORE BEACH, EXTENSION, PERMIT.

The extension of the beach at Sheridan road and Ardmore avenue along Lake Michigan which in no way impairs harbor rights facilities nor affects navigation may be permitted on condition that the granting and exercising of the permit shall not operate to create vested property or easement rights and shall be subject to revocation upon notice.

Hon. Richard W. Wolfe, Commissioner of Public Works:

We are replying to the following communication and request submitted by you and the Harbor Master, Charles J. Agnew, Esq., viz.:

“I am in receipt of an application in behalf of the Edgewater Athletic Club for permission to dump sand and gravel from the excavation on the club site at the northeast corner of Sheridan road and Ardmore avenue, said excavation to be dumped into the waters of Lake Michigan east of the shore protection bulkhead. The shore protection bulkhead was constructed under permits from the City of Chicago and Commissioners of Lincoln Park on the west boundary line of Lincoln Park.

“Will you kindly advise me as to the law in the matter in so far as the issuance of a City permit covering the dumping of the sand into the open waters of the lake is concerned?”

From an examination of the maps and plans of the territory affected by the proposed filling in of the lake at the northeast corner of Sheridan road and Ardmore avenue, we find the permit sought by the Edgewater Athletic Club is very largely for a private property improvement with little public rights or interests involved. The lake shore as outlined by the Lincoln Park improvement

is projected far out into the lake from the old water edge and is even now so far altered by the work which has been completed on the said improvement, as in no appreciable degree to be affected by the comparatively small fill sought to be made by the Athletic Club, and the Club now holds the permit of the Lincoln Park Board for which the Club now seeks a similar permit from you. The only apparent adverse interest involved is that of the Lincoln Park Board itself. The Park Board will in time make this fill carry the property line far beyond that proposed in the creation of the Athletic Club's proposed beach.

The general public will have access to the small sand and gravel beach proposed to be constructed by the Athletic Club adjacent to their present property line off Ardmore avenue. No harbor rights or facilities appear in any way to be impaired by the proposed improvement, and since the shore line of the lake is so far removed or in process of being removed by the Lincoln Park improvement plan, nothing proposed to be done under the permit, if granted, can affect navigation or harbor rights over which the Federal Government has jurisdiction.

We therefore are of the opinion that a permit as requested may lawfully be issued stating therein the conditions named in the request and conditioned also that the granting and exercise of the permit shall in no way operate to create any vested property or easement rights, and shall be subject to revocation for cause and upon due notice.

(No. 6201—April 23, 1928—G. F. M.)

PENSION CHECKS, ATTORNEY IN FACT.

It is permissible to make a pension check payable in the alternative to the pensioner or to the person named as attorney in fact with the words "attorney in fact" added after the name of the person so designated.

Retirement Board, Policemen's Annuity and Benefit Fund:

Replying to your request for an opinion as to a valid form of check in cases where the pensioner has appointed an attorney in fact, the following is submitted:

Your letter states that the City Treasurer requests a change in the system of handling pension checks which are endorsed by attorneys in fact, because of the cumbersomeness of the present system.

In all cases where a pensioner has appointed an attorney in fact to receive and collect pension payments due such pensioner, it would be perfectly proper and legal to have the check made payable to the pensioner or the attorney in fact, by inserting both the name of the pensioner and the name of the attorney in fact on the face of the check as payee thereof with the word "or" between the two names so that the said check could be cashed by either the pensioner or the attorney in fact.

In view of the fact that the Policemen's Annuity and Benefit Fund Act prohibits a pensioner from assigning his or her pension, the execution of a power of attorney by the pensioner is merely a matter of convenience for the pensioner and does not in any way prohibit the pensioner from cashing his or her own check; and since the pensioner may wish his or her attorney in fact to negotiate the check, it is perfectly legal to make the check payable,

in the alternative, to the person who is the attorney in fact, writing the words "attorney in fact" on the face of the check after the name of the person designated in the power of attorney to act as such.

(No. 6202--April 23, 1928—G. F. M.)

POLICE BENEFITS, ANNUITY DURING DISCHARGE.

A patrolman is entitled to annuity payments for the period between the date of discharge and date of reinstatement if he is 50 or more years of age and has served 10 years or more at the time of his discharge or resignation.

Retirement Board, Policemen's Annuity and Benefit Fund:

Replying to your request for an opinion as to the right of William M. Skelly to certain annuity payments, the following is submitted:

Your letter states that William M. Skelly was discharged from the Police Department on November 5, 1926; that he had served 19 years, 10 months and 27 days; that he was over fifty years of age at the time of his separation from the service; that he made application for annuity on December 8, 1926, which application was deferred by the Board at the meeting of December 16, 1926, and never subsequently acted on; that Skelly was reappointed to the police service on July 20, 1927, and resigned September 1, 1927, with a net service credit of 20 years and 7 days; that at the meeting of September 16, 1927, he was awarded a life annuity of \$104.16 per month; that Skelly has made a request that he be paid his annuity for the period from

November 6, 1926, to July 20, 1927; and that the said annuity so requested to be paid is in the amount of \$35.12 per month.

Paragraph D of section 31 of the Policemen's Annuity and Benefit Fund Act provides that any present employee who shall resign or be discharged from the service after he shall have served ten or more years and who at the time of such resignation or discharge shall be 50 years or more but less than 57 years of age, shall have a right to receive annuity from and after the date of such resignation or discharge of such amount as can be provided from the sum accumulated for age and service annuity purposes from deductions from his salary, and from certain other sums specifically designated in subparagraph 3 of said paragraph D.

Paragraph D hereinabove referred to is very specific in providing that any present employee discharged after ten or more years of service and when more than 50 years of age shall have the right to receive annuity from and after the date of such discharge. Mr. Skelly having been such a present employee so discharged, became entitled to the annuity provided in said paragraph D immediately upon his discharge.

I am of the opinion that the original application of Mr. Skelly for annuity from the date of his discharge should be granted and that Mr. Skelly should be paid the amount of annuity to which he was entitled from his discharge to the date of reappointment on July 20, 1927.

(No. 6203—April 27, 1928—I. H.)

SEWAGE PUMPING STATION SITE, PURCHASE, WATER FUND.

An appropriation for the purchase of a site for a sewage pumping station made from the water fund is in the interest of speed and economy.

Hon. Richard W. Wolfe, Commissioner of Public Works:

We are in receipt of your letter of recent date concerning the proposed purchase of a site for a new sewer pumping station to serve the southeasterly portion of the City lying south of 114th street and east of Lake Calumet. You ask for an opinion as to the best method to pursue in order to secure such site.

Attached to your letter is a communication from the President of the Board of Local Improvements, in which he says that it is necessary to secure this site, but that it is impracticable to obtain it through special assessment proceedings. Notwithstanding this, you mention four methods of effecting a purchase, among which is the procedure by special assessment, and you inquire of us whether any of these four methods have any outstanding advantages from a legal standpoint.

The four means of making the proposed purchase which you suggest are as follows:

1. Appropriation from the Water Fund.
2. Appropriation from the General Corporate Fund.
3. As a part of the Special Assessment for the Sewer System.
4. Purchase by the Sanitary District of Chicago.

It would seem as though the logical procedure would be by special assessment. The new sewer system is a local

improvement designed primarily for the benefit of the district mentioned. The remainder of the City is drained by systems for which the people of the City have already furnished the means. If the people of the whole City are called on to pay this portion of the cost of the new system they will be relieving property owners in the district which it serves of burdens and obligations that naturally belong to them.

The disadvantages of a special assessment for this purpose are that it will be necessary to defer the purchase of the site until the assessment for the entire improvement has been spread and confirmed during which time property values may rise; that the proceeding is cumbersome and costly by reason of the condemnation suit involved; and that there is a possibility of delaying the entire proceeding on account of legal objections as to any particular site.

Inasmuch as the cost of a suitable site in the district in question will form but a small portion of the entire cost of the proposed improvement, it may be advisable to simplify the procedure by purchasing the property necessary before the assessment is spread. While this may result in a material advantage, the determination of whether or not to pursue such a course is to be regarded more as a question of policy than a question of advantage from a legal standpoint.

If it should be decided to purchase before beginning the local improvement proceeding, our recommendation is that an appropriation for the purchase of the site should be secured from the Water Fund. Our reason for this is that the users of water would be the ones who would benefit most from proper sewage disposal, and it would therefore be more equitable to charge the expense to them rather than to the general public on the basis of an *ad*

valorem tax. That is the theory under which appropriations are made for the maintenance of sewer pumping stations, and such theory holds good with respect to the purchase of sites for them.

The same reasoning applies to the purchase of the site by the Sanitary District of Chicago. If the Sanitary District were to buy the site the general public in the entire district would have to pay for it. In any event, the Sanitary District trustees would have the last word with reference to this matter, and they might not be disposed to advance money at this time for a project which cannot be completed for years.

Our recommendation, therefore, is that in the interest of speed and economy there should be an appropriation from the Water Fund for the purpose.

(No. 6204—April 27, 1928—F. J. V.)

1 FIRE DEPARTMENT, CAPTAIN AND LIEUTENANT,
CIVIL SERVICE.

Captains and lieutenants in the fire department now exist by virtue of the clause "such other employees as shall be provided for in the annual appropriation" in chapter XXIX of article 1 of the Municipal Code of 1922 as amended by Ordinance of May 21, 1924. The office of captain in the fire department is a position next higher to lieutenant and can be obtained by the latter under existing ordinances only through a promotional examination. Lieutenants cannot participate with captains in a promotional examination for battalion chief.

2 CIVIL SERVICE, MERGING POSITIONS.

The Civil Service Commission alone has power to classify, grade and regrade offices and positions in the Civil Service, but the Commission has no power to merge a higher and lower position with different salaries into the higher position. Thus a captaincy and lieutenantcy in the fire department cannot be merged by the Commission into the former position.

*Hon. John J. Hoellen, Chairman, Committee on Schools,
Fire and Civil Service:*

In your official communication of the 22d instant you state that "there is an order pending before" your committee "directing that the necessary action be taken to regrade the lieutenants in the Fire Department to the grade of captain." You also state that you were directed to request the Law Department "to furnish the committee with an opinion as to whether it is legally possible to regrade the lieutenants in the Fire Department to the rank of captain without requiring the lieutenants to submit to a civil service promotional examination."

It seems from your communication that the Committee assumes that it has the power by its own order, or that

of the Council, to direct the regrading of lieutenants and captains to the grade of captain. Neither the Committee nor the City Council itself has such power. The City Council as the legislative branch of the City Government may create and abolish offices, positions and places of employment in the civil service. The Civil Service Commission, as an arm of the executive branch of the government, alone classifies and regrades offices, positions and places of employment as directed by the Civil Service Law. In the work of classifying and regrading of civil service places the Civil Service Commission is governed solely by the places in the service as the Commission finds them created, existing and defined by the City Council's ordinances. Not even by direction of the City Council contained in such ordinances has the Council the power to direct how the existing places in the service shall be classified and graded by the Civil Service Commission, the Commission being the sole judge as to how such classification and regrading shall be made.

To bring about the suggested merging of the present positions of captain and lieutenant in the civil service the Council must abolish the position of lieutenant and provide by ordinance for the position of captain alone.

By chapter XXIX of article 1 of the Chicago Municipal Code of 1922, as amended by ordinance of May 21, 1924, captains and lieutenants are no longer named as offices or positions in the Fire Department as such department is now established. These two positions are authorized by that part of the above ordinance which provides that the Fire Department shall include, in addition to the offices named, "such other employees as shall be provided for in the annual appropriation bill."

The last appropriation bill contains the following provision :

51-A-2	Captain,	184	at.....	\$3,200.00
51-A-3	Lieutenant,	211	at.....	2,900.00.

As thus created it is obvious that the two positions of "captain" and "lieutenant" are entirely different both in name (captain always recognized as higher than lieutenant) and in salary. It would therefore be impossible to regrade these positions as they now exist under the City's appropriation ordinance to that of captain. The Civil Service Commission itself could not legally do so nor could the Council by order or ordinance confer any such power upon the Commission.

By virtue of the Civil Service Act and the rules of the Civil Service Commission adopted pursuant to such Act, and the decisions of the Supreme Court, the position of lieutenant is lower in rank to that of captain, and the position of captain is a promotional one which can be attained by the lieutenants only through a promotional examination, so long as the two positions continue thus to exist under the ordinance.

In the recent case of *People ex rel. Clark v. Finn et al.*, No. 417821, in the Superior Court of Cook County, the lieutenants in command of fire companies demanded the right to participate with captains in the promotional examination for chief of battalion in the Fire Department. Solely on the issue of law raised by demurrer the court sustained our contention, as above stated, that lieutenants in command of fire companies were not the same in civil service rank as captain and the two could not participate in the promotional examination for battalion chief, which under the law is limited to captains alone as constituting the next lower in rank to that of battalion chief. The

opinion of this department directed to Hon. A. A. Sprague, Commissioner of Public Works, September 23, 1925 (Opinions of the Corporation Counsel, 1925-1926, p. 326), is important on the proposition here involved. In that opinion we took occasion to say:

“To permit employees in the next lower *grade* of the civil service to take a promotional examination who are necessarily two ranks lower in classification than the position of chief clerk, in company with or to the exclusion of the assistant chief clerks who are in the next lower rank to the position of chief clerk, is clearly illegal and invalid. To this effect was the recent decision of the Superior Court of Cook County (Judge Mangan, presiding) in the case of lieutenants in command of fire companies who demanded the right to participate with captains in the promotional examination for chief of battalion in the Fire Department. (See *People ex rel. Clark v. Finn et al.*, No. 417821:).” See *People v. Errant*, 229 Ill. 64, 65.

As the positions of captain and lieutenant now exist and are defined the Civil Service Commission cannot regularly “regrade the lieutenants in the Fire Department to the grade of captain,” so as to dispense with the promotional examination which lieutenants must take to become captains, and so as to entitle such lieutenants to participate with captains in the promotional examination or the higher position of battalion chief. On this point what we had to say in our official opinion above cited is important and we quote from such opinion as follows:

“The test of eligibility to try for promotion in the civil service is plainly prescribed by section 9 of the Civil Service Act as follows:

“‘All examinations for promotion *shall* be competitive *among such members of the next lower rank* as desire to submit themselves to such examination.’

“The right here given to every member of the next lower rank, engaged in the same line of service, is given in language so plain and unequivocal as to ad-

mit of no possible construction by any court or commission that would in any degree limit or circumscribe that right. It is not within the power of the Civil Service Commission itself by rule or administrative act nor in the appointive power by delegation of authority from the Commission, to deprive the civil service employee of this right. Any such rule or act of the Commission, or delegation of authority would be illegal and void under the Civil Service Act. *People ex rel. Kaster v. Kearney, Com.*, 164 N. Y. 14, 58 N. E. 64; Opinion No. 680, Com. of Pub. Wks., of date Dec. 9, 1924." Opinion of January 23, 1928, Fire Commissioner.

(No. 6205—April 28, 1928—R. N. L.)

PARKS, CONNECTING STREETS, OWNERS' CONSENT.

In investing Park Boards with the right to control and maintain streets as part of the parks' system, the consent of the owners of property abutting upon such streets is not necessary.

Hon. J. B. Bowler, Council Chambers:

In reply to your personal inquiry of Hon. James W. Breen, Assistant Corporation Counsel, relative to the necessity of obtaining consent of the owners of property abutting on streets where they are given or granted to the Park Commissioners to take, regulate or improve, control or govern said streets, I beg to state that by the Act of April 9, 1879, it is provided that every Board of Park Commissioners who have power to connect any public park, boulevard, or driveway under its control, with any park of any incorporated city, town, or village, by selecting and taking any connecting streets leading to such park, the

Park Board should have the same power and control over the parts of streets taken as that vested in them of and concerning the parks, boulevards, and driveways under their control, and a municipality is given full power and authority to invest the Park Board with the right to control and maintain any of the streets of the City for the purpose of carrying out the provisions of the Act.

Article V in the Cities and Villages Act, Cahill's Statute of 1927, section 1, paragraph 7, under the power of the City Council relative to ordinance reads as follows:

"To lay out, to establish, open, alter, widen, extend, grade, pave, or otherwise improve streets, alleys, avenues, sidewalks, wharves, parks, and public grounds, and vacate the same, and for such purposes or uses to take real property or portions thereof belonging to said city or village and already devoted to a public use, when such taking will not materially impair or interfere with the use already existing and is not detrimental to the public."

Therefore, in our opinion the municipality is given full power and authority to invest the Park Board with the right to control and maintain any of the streets of the City for the purpose of the carrying out of the provisions of the Act of April 9, 1879, and that no consent is necessary from the property owners abutting on said street.

(No. 6206—May 1, 1928—L. H.)

1 MUNICIPAL DEVICE, USE OF.

The use by an unofficial body or the public of a shield with the words "I Will" is not forbidden by section 1020 nor any other provision of the Municipal Code of 1922.

2 MUNICIPAL CODE OF 1922.

Section 1026 requiring the use of municipal flags, etc., for decoration only is inapplicable to municipal devices.

Ralph W. Liddle, Esq., Chairman, Publicity Committee of Chicago Safety Council:

You referred to the Law Department of the City of Chicago the tentative design which the Chicago Safety Council desires to use as an emblem, in combination with the words "I Will." You ask whether such use would conflict with the City ordinances or with any general policy of the City in such matters.

There is no law which will be violated by the use of the emblem and words as you propose. On the contrary, so far as the emblem is concerned, the ordinances of the City expressly authorize its use by the general public. Section 1020 of the Chicago Municipal Code of 1922 reads as follows:

"The municipal device, for use by the varied unofficial interests of Chicago, and its people, shall show a Y-shaped figure in a circle, colored and designed to suit individual tastes and needs."

While your proposed design substitutes a shield in place of a circle, there can be no objection to its use in that form by an unofficial body. There is an inhibition, in sec-

tion 1026 of the Code, against the use of the municipal flag, standard, pennant, or badge, except for purposes of decoration or display. This does not apply to the municipal device, however, and you are at liberty to use that as you see fit.

(No. 6207—May 1, 1928—L. H.)

COAL CONTRACT, CHANGE IN SHIPPING POINTS, ADDITIONAL COMPENSATION.

Under a clause in a contract for adding or subtracting from the contract price an amount equal to an increase or decrease from freight rates from mine to the destination, a contractor is entitled to additional compensation to cover an increase in rates on account of a longer haul made necessary by reason of a strike at the original point of shipment, although there was no change in freight rates at that point.

Hon. Richard W. Wolfe, Commissioner of Public Works:

We are in receipt of your letter of recent date in which you ask advice concerning the claim of the Wisconsin Lime and Cement Company for additional compensation for coal delivered in 1927 on account of the extra cost of freight necessitated by shifting the point of production at the time of the strike in the Illinois coal fields.

From the data submitted by you it appears that the company in question obtained a contract from the City under which it was to furnish coal mined in Sangamon County, Illinois, for the period extending from April 1,

1927, to December 31, 1927. The freight rate from that point to Chicago was \$1.65 per ton. For a long time during this period the coal miners of Illinois were on a strike which prevented the delivery of coal from the mines of this State. This necessitated the purchase of coal by the contracting company from other places of origin, and the coal for which the extra money is demanded came from Kentucky mines. The freight rate to Chicago from these Kentucky coal fields was \$2.20 per ton. The difference in the freight rate—55 cents per ton—represents the claim of the company.

The contract under which the coal was delivered contained the following provision:

“Should the freight rate from mine to destination be increased above or decreased below the scale indicated on the proposal, there shall be added to or deducted from the price paid to the Contractor an amount equivalent to such increase or decrease, expressed in cents per ton.”

There is also a similar covenant in the contract concerning an increase or decrease in the wages of miners or workmen in allied trades.

From the language used and the general scope of these and other provisions in the contract, it would seem that it was the intention of the City and the Contractor that the rate of compensation should be a certain amount per ton for the coal itself and in addition thereto the cost of labor and freight according to the rates prevailing at the time of shipment. In case all shipments had been made from the Illinois mines the only point that could arise would be the question of the bona fides of the change if any occurred.

There was no change in the freight rate from the original point of shipment, but there was necessity for a longer haul. This varies the situation slightly from the exact condition covered by the clause above quoted, but it would seem to be governed by the same principle, and the spirit of the agreement undoubtedly was that there should be extra compensation allowed.

A question regarding the allowance of extra freight rates arose at the time the Federal Government controlled the railroads and raised the rates. The Law Department at that time held that "unless there is a provision in the contract which contemplates a change in the contract price where the freight rate is changed, no extra compensation can be allowed." (Opinions of the Corporation Counsel and Assistants from July 1, 1916, to December 31, 1919, p. 770.) Since then the agreement in regard to varying freight rates has been inserted in such contracts, and consequently the present claim stands on a different basis from the one just mentioned.

Our conclusion is that under the terms of the contract the City is liable for the additional freight rate. Such being the case, there will be no occasion for an order of the City Council granting specific authority to pay.

(No. 6208—May 4, 1928—L. H.)

1 APPROPRIATIONS, DEKOVEN STREET PROPERTY, PURCHASE OF.

The ground on which the great Chicago fire started (558 DeKoven street) may be purchased out of the appropriation from the bond fund for playgrounds, public parks, etc., as such property when purchased and made use of as a place of commemoration would come within the meaning of the word "park."

2 WORDS AND PHRASES.

The word "park" means a place or tract of ground set apart for the purpose of public ornament or commemoration.

Hon. Charles C. Fitzmorris, City Comptroller:

In your letter of recent date you referred to the ordinance passed by the City Council on March 5, 1928, and appearing on pages 2328-2329 of the Council Journal of that date. This authorizes the purchase by agreement if possible, and if necessary by condemnation, of the property at 558 DeKoven street, and provides for the payment of the money out of the appropriations set up from the bond fund for playgrounds, parks and bathing beaches. You ask to be advised whether such purchase can properly be charged against the appropriation in question.

The ordinance referred to declares that the property will be useful, advantageous and desirable to the City of Chicago for municipal purposes. It does not state expressly that it is for park or playground purposes, but if useful, advantageous or desirable for park or playground purposes, it comes within the general declaration that it is useful, advantageous and desirable for municipal purposes. This is true because the acquisition and maintenance of parks and playgrounds comes within the general

term of "municipal purposes." Hence, the only question that arises is whether the property will be used for purposes of a park or playground—necessarily it cannot be used as a bathing beach.

We are informed that the property at 558 DeKoven street is the ground on which the Great Chicago Fire started. It is therefore of historic value, and the presumption is that after it is acquired it will be improved and maintained in such manner as to be of interest and instruction to the people of Chicago and to visitors in the City. There is ample authority for construing a place or tract of ground set apart for purposes of public ornament or commemoration as one that comes within the definition of the word "park." *Elmen v. City of Gothenburg*, 200 Fed. 564.

Such being the case, we are of the opinion that its purchase and maintenance is proper under the power that the City has "to acquire municipal parks, playgrounds, public beaches and bathing places, and to improve, equip, maintain and regulate the same." Cities and Villages Act, art. XII, part 3, sec. 6.

We beg to advise you, therefore, that it will be entirely proper to draw on the appropriation named in the ordinance for funds for the purpose of acquiring the said property.

(No. 6209—May 9, 1928—L. H.)

1 SPECIAL ASSESSMENTS. COLLECTION, POSTPONEMENT, CITY COUNCIL.

The City Council is without power to order the staying of the collection of special assessments pending the passage and approval of an additional bond issue to complete the public improvement provided for by an existing improvement ordinance, under which the improvements are in a progressive stage of development.

2 SPECIAL ASSESSMENT PROCEEDINGS, DISMISSAL OR ABANDONMENT, CITY COUNCIL.

The right of the City Council to dismiss special assessment proceedings which have not matured to the letting of contracts and the issuance of bonds, can be exercised only before final judgment of confirmation is entered, or before written election to proceed with the improvement has been filed.

3 ORDINANCE, AMENDMENT OR SUSPENSION.

A valid ordinance can be repealed, amended or suspended only by a legislative enactment of equal dignity; a mere order of the City Council is not of the same dignity as an ordinance.

4 LOCAL IMPROVEMENTS ACT.

Section 56 of the Local Improvements Act does not authorize the dismissal of a special assessment proceeding merely for the purpose of immediately commencing a like proceeding.

Hon. Oscar F. Nelson, Chairman, Committee on Judiciary and Special Assessments:

We are in receipt of a letter from the City Clerk stating that the City Council, by motion, directed that the Corporation Counsel should render an opinion to the Committee on Judiciary and Special Assessments on the subject-matter of a proposed order authorizing the Board

of Local Improvements and the City Collector to stay further action on the collection of special assessments for the widening of North Ashland avenue and all other major street widening projects. The order passed by the City Council reads as follows:

“ORDERED, That the Board of Local Improvements and the City Collector be and they are hereby authorized and directed to stay all action in the matter of the collection of special assessments for the widening of North Ashland avenue and all other major street-widening projects until such time as additional bond issues for said improvements shall have been approved by the voters of the City of Chicago.”

So far as the order itself is concerned, outside of being an expression of the proposed policy of the Council, if passed it would be a mere nullity. The street improvements in question were provided for by ordinances of unquestioned validity duly passed and now in full force and effect. Valid ordinances cannot be repealed or amended except by a legislative enactment of at least equal dignity. Hence, it would be necessary under any circumstances, even if the City Council had the power to change the status, that there should be an ordinance enacted instead of an order. We will therefore treat the subject as if you had before you an ordinance in proper form and designed to do the thing contemplated by the proposed order.

While the various major street improvement projects involved are at different stages of development, all of them, or nearly all of them, are so far along that the special assessments are in process of collection. In addition to this, most of these improvement ordinances (if not all) provide for the condemnation of land, and in many cases awards have been made and judgments thereon have been entered.

Apparently it is not the intention to abandon the improvement, but merely to defer the collection of the assessments until such time as money can be obtained from future bond issues that will be necessary to complete the improvement. Manifestly this cannot be done at this stage of the proceedings. Again, the provision which says that action should be stayed until such time as additional bond issues for the improvements shall have been approved, might be construed technically as an abandonment, because there can be no certainty of bond issues therefor being approved at any time. If construed as an abandonment the City will probably be liable for damages in instances where actual damage can be shown.

The City Council has the right to order the dismissal of special assessment proceedings before final judgment of confirmation has been entered and to repeal an ordinance for a local improvement at any time before a contract for the making of the improvement has been let, but cannot stay collection afterwards without the consent of the contractor and the holder of the special assessment bonds. This is expressly stated in the statute. It also has the right to dismiss the proceedings before final judgment in condemnation proceedings is rendered, unless it has filed its written election to proceed with the improvement. After filing its election or after final judgment, as the case may be, this right is terminated. Section 56 of the Local Improvement Act reads, in part, as follows:

“The judgments of the court shall be final as to all the issues involved, and the proceedings in said cause shall be subject to review by appeal or writ of error as hereinafter provided, and not otherwise: *Provided, however,* that by mutual consent the same may be vacated or modified at a subsequent term, except as hereinafter provided. * * *

“Nothing in this section contained shall interfere with the right of the petitioner to dismiss its proceed-

ings, and for that purpose to vacate such judgment at its election at any time before commencing the actual collection of such assessment, and the court in which the judgment is rendered shall enter an order vacating or annulling said judgment of confirmation on motion of petitioner entered at any time after the expiration of the term at which judgment of confirmation was entered upon a showing by petitioner that no contract was let or entered into for the making of said improvement within the time fixed by law, for the letting of the contract or that the making of such improvement under the original proceeding was never commenced, or that the making of said improvement under the prior proceedings was abandoned by petitioner, and no judgment entered in such proceeding so dismissed and vacated shall be a bar to another like or different improvement; *Provided*, that after the contract for the work shall have been entered into, or the bonds mentioned in this Act issued, no judgment shall be vacated or modified or any petition dismissed at a term subsequent to that at which the judgment was rendered, nor the collection of the assessment be in any way stayed or delayed by the council or board of trustees, or board of local improvements, or any officer of the municipality, without the consent of the contractor and bondholder." Cahill's Stat. 1927, p. 335.

This section has been construed as having only the limitation that the proceedings may not be abandoned merely for the purpose of immediately beginning them again. Otherwise the section is conclusive as to all special assessment proceedings.

"The true construction of these provisions of the section is, that the judgments confirming assessments of benefits are final unless reversed on appeal or by writ of error, or vacated or modified by mutual consent of the parties thereto, or the petitioner shall determine to abandon the construction of the proposed improvement and dismiss the proceedings under the ordinance, in which latter event the petitioner may procure such judgments to be vacated. But a city cannot be permitted, under the guise of abandoning

the construction of the improvement, to repeal the ordinance for the improvement and of its own motion vacate judgments fixing the amounts of the benefits of the proposed improvement to the property of the citizen, with a view, as here, to immediately reenact the ordinance providing for the construction of the identical improvement, and under such latter ordinance insist the adjudications under the former proceedings shall stand for naught." *McChesney v. City of Chicago*, 188 Ill. 423, 427; see also *Gage v. City of Chicago*, 193 Ill. 108.

With respect to condemnation proceedings, the rule is that in the absence of statutory provisions expressly regulating the stage at which the condemning party may dismiss or abandon condemnation proceedings, and where the acts authorizing such proceedings do not contemplate the passing of title before judgment, it is generally held that prior to final judgment, the proceedings may be dismissed although there has been an award or verdict returned. See authorities listed in 28 L. R. A. (N. S.) 91.

"It is the settled law in this State, that the applicant for condemnation may, at any time before payment of the compensation, or the appropriation of the property by taking and retaining possession, discontinue and abandon the improvement and all proceedings to carry it into effect. *St. L. & S. F. R. v. Teters*, 68 Ill. 144; *Chicago v. Barbiam*, 80 Ill. 482; *Village of Hyde Park v. Dunham*, 85 Ill. 570." *City of Chicago v. Shepard*, 8 Ill. 602-608.

The view expressed in the above case by Judge McAllister, in which he cites the earlier Supreme Court cases, was later upheld by that court in the following decisions: *C. & N. W. Ry. Co. v. City of Chicago*, 148 Ill. 141-152; *City of Chicago v. Hayward*, 176 Ill. 130; *City of Chicago v. Goodwillie*, 208 Ill. 252.

We are of the opinion, therefore, that the proceedings in the improvement cases in question are too far advanced

to permit the City Council to abandon or defer them. So far as the assessments have been levied the collections must proceed. While we state this generally, it may be that some of the improvements are not so far along, and as to them the above opinion will indicate whether they can be abandoned or not.

(No. 6210—May 11, 1928—L. H.)

MECHANICS' LIEN NOTICE, VOUCHER BEFORE NOTICE.

The receipt of a notice of lien by the City Treasurer does not stop the payment of a voucher previously issued and delivered to a contractor, as under section 23 of the Mechanics' Lien Law, in case of public improvements, a lien attaches only to what remains after the issuance of vouchers.

Hon. Charles S. Peterson, City Treasurer:

We have your letter of recent date in which you make inquiry concerning the rights of lien claimants against funds collected for local improvements where vouchers were issued to the contractors before notices of the liens were filed.

You state that it frequently happens that notice of lien is filed after a voucher has been delivered to a contractor, and that later on the Comptroller issues a warrant directing the City Treasurer to pay the money to the contractor or his assignee. You ask particularly what effect such notice of lien has, if received by you after the delivery of the voucher by the Comptroller, but previous to the issuance of the warrant.

Such notice of lien after the issuance of a voucher, against the obligation of the City described therein, has no legal effect. This is covered by statute. Section 23 of the Mechanics' Lien Law provides for a lien of a contractor in the case of a public improvement when notice is served on the proper official, but this is subject to the following proviso:

“* * * *and, provided further*, that such lien shall attach only to that portion of such money, bonds or warrants against which no voucher or other evidence of indebtedness has been issued and delivered to the contractor by or on behalf of the county, township, school district, city or municipality as the case may be at the time of such notice.” Cahill's Stat. 1927, p. 1598.

This proviso has been in effect since July 1, 1917, and specifically disposes of the class of claims of which you speak.

(No. 6211—May 11, 1928—L. H.)

CITY OF CHICAGO, CHARTER.

The charter of the City of Chicago is not in one instrument but consists of the Cities and Villages Act of 1872 and of numerous special acts for the City of Chicago as well as acts designed for cities and villages of more than 100,000 inhabitants. It includes various supplementary acts under which local governmental functions are carried on. Acts creating Park Boards, the Sanitary District, the Board of Education, etc., are also part of the Chicago Charter.

Hon. John H. Thieler, San Francisco, California:

Your letter of recent date addressed to the Treasurer of the City of Chicago was referred to the Law Department

for reply. You state therein that you are desirous of obtaining for your office library, a copy of the City charter, or organic law, including amendments to date, of the City of Chicago.

We regret very much that we are unable to comply with this request because the Charter of the City of Chicago is a very complex affair, and is not in the shape of one instrument, nor are the parts published in one volume except in so far as they appear in different places in the revised statute of the State of Illinois.

The City of Chicago originally had a charter which was revised from time to time, the last revisions being in 1863 and 1866. In 1872 a legislative act, known as "Cities and Villages Act," was passed which was designed to be a general charter for all cities and villages that adopted it. The City of Chicago adopted it, and has been acting under it since then.

But in addition thereto there have been numerous special acts for the City of Chicago; also numerous acts designed for cities and villages of more than 100,000 inhabitants, which in this State means the City of Chicago; also various supplementary acts under which local governmental functions are carried on, etc. In addition to this, we have over-lapping corporations, consisting of park boards, a sanitary district, a board of education, etc. These are co-extensive with the City of Chicago, and the acts creating them, properly speaking, are parts of the charter of the City of Chicago.

You will see from the above that to comply with your request is not practicable. At the same time, if you will indicate any particular thing that you desire, we will endeavor to secure it for you.

(No. 6212—May 14, 1928—F. J. V. and F. J. C.)

1 PUBLIC GARAGE, CONSTRUCTION AND MAINTENANCE,
SOUTH PARK COMMISSIONERS.

The Board of South Park Commissioners under their general powers to control and regulate the South Park system may lawfully pass an ordinance authorizing the construction and maintenance in Grant Park of an underground garage or public parking place for motor vehicles and impose a reasonable charge upon users of the same; or such Board may lease such garage to private interests upon reasonable compensation but subject at all times to the control and supervision of the Board.

2 PARK COMMISSIONERS, POWER, NATURE.

The power exercised by the South Park Commissioners if involving discretion and legislation is of a political and not private nature, with which the courts only interfere in order to prevent a gross abuse of such power.

3 GRANT PARK DEDICATED PORTION, POWER OF
SOUTH PARK COMMISSIONERS AND CITY COUNCIL.

The portions of Grant Park which have been dedicated are controlled by the terms of the dedication, which terms are binding alike upon the Park Commissioners and the City Council, one of which restrictions is the freedom of the specific portion of the park from structures and buildings of any kind.

Hon. Samuel A. Ettelson, Corporation Counsel:

Complying with your recent request, we are submitting herewith our opinion on the general proposition of the power of the Board of South Park Commissioners to construct and maintain in the park system under their jurisdiction, more particularly in Grant Park, an underground garage or public parking place for motor vehicles and to maintain the same by leasing to private interests upon proper letting for a reasonable compensation to the Park Board, such parking place to be open to the general public

in connection with their use and enjoyment of the park system.

We should consider first the character of the holdings of the lands comprising the park and the acquisition of these lands, whether by grant of the Legislature or by dedication of the original land owners.

By Act of the Legislature entitled "An Act to convey and designate certain submerged lands known as Lake Front for park purposes," in force July 1, 1899, it is provided by section 1 thereof:

"That the land or lands located in the City of Chicago, County of Cook and State of Illinois * * * which land is commonly known and designated as the 'Lake Front,' including all submerged land * * *, shall be, and are hereafter to be called, designated and known as Grant Park, and said Grant Park is hereby conveyed to the South Park Commissioners to be held, managed and controlled by said commissioners as other parks are now under their control." Cahill's Stat. 1927, chap. 105, par. 150, p. 1802.

In a similar Act of the Legislature entitled "An Act conveying certain lands to the South Park Commissioners for the purpose of establishing a public park or pleasure ground thereon," in force May 14, 1903, it is provided in section 1 thereof:

"That the land, including all submerged land, known as Grant Park, in the City of Chicago, County of Cook and State of Illinois, bounded on the north by the south line of Randolph street extending in a straight line east from Michigan avenue to the harbor line established by the Secretary of War in Lake Michigan, and bounded on the east by said harbor line, and bounded on the south, east of the right of way, easement and grounds of the Illinois Central Railroad Company, by the south line of the street known as Lake Park place (formerly known as Park Row) extended in a straight line east from Michigan avenue to said harbor line, and west of said right of

way, easement and grounds by the north line of said Lake Park place, and bounded on the west by the east line of Michigan avenue, excepting, however, the right of way, easement and grounds of the Illinois Central Railroad Company extending north and south through said Grant Park, as described in an ordinance of the City Council of the City of Chicago, passed October 21, 1895, and published by authority of said council in 1898 in volume 2 of Special Ordinances of the City of Chicago, at page 657, be and the same is hereby conveyed to the South Park Commissioners, to be held, managed and controlled by said commissioners as other parks now are under the control of said commissioners."

In addition to the grants of land made to the Board of South Park Commissioners by the foregoing Acts, there are those lands which have come to the Park Commissioners by dedication of the original land owners, part of which, in fact, are included in the foregoing grants.

The lands thus dedicated and the history of their acquisition by the Board is set out in the language of the Supreme Court in the case of the *City of Chicago v. Ward*, 169 Ill. 392, at page 400. The court says:

"In 1836 the commissioners of the Illinois and Michigan canal, under the authority conferred upon them by the General Assembly of the State, caused fractional section 15, lying along the shore of Lake Michigan and adjoining or cornering with the original town of Chicago, to be subdivided into lots, blocks and streets, and a plat thereof was made, acknowledged and recorded on July 20, 1836. This subdivision consists of two tiers of blocks, of eleven blocks each, bounded on the west by State street, on the north by the center line of Madison street, and on the south by the center line of Twelfth street. The lots in the east half of the eastern tier of blocks all fronted to the east, and there was an open space between such east line and the lake, except at the southwest corner, in which block 23 was laid off, beginning 120 feet east of the east line of the eastern tier of blocks and running thence east 500 feet, of a uniform

depth toward the north of 200 feet, leaving a small space the width of which was not marked on the map, about 80 feet, between the easternmost lot of block 23 and the lake. The street north of this block 23 is now known as Park Row. The distance from the eastern tier of blocks to the lake shore was therefore about 700 feet at Park Row. The distance at the north line of the section from the lake shore to the east line of the eastern tier of blocks was not marked on the plat, but appears to have been about 500 feet. All the space north of block 23 and east of the eastern tier of blocks to the lake was left unsubdivided and vacant, except that the words 'Michigan avenue' appear on the same next to the line of subdivided blocks. * * *

"The land north of section 15, running to the Chicago river, being the southwest fractional quarter of section 10, was used by the United States as the military post of Fort Dearborn as early as 1804. Under authority from the Secretary of War this fractional quarter was subdivided into blocks, lots, streets and public grounds and called 'Fort Dearborn addition,' and a plat of the addition was acknowledged and recorded on June 7, 1839. Michigan avenue was continued north in this plat almost up to the river, but its width was not marked on the plat. The ground between Michigan avenue and the lake was also laid off into blocks and lots from the river down to Randolph street, but from the north line of that street to the south line of the section, being the center of Madison street, the space between the west line of Michigan avenue and the lake was left vacant and unsubdivided, as was also the east half of the block just south of Randolph street, between Wabash avenue on the west and Michigan avenue on the east, and in this blank space on the plat was written, 'Public ground forever to remain vacant of buildings.' The certificate of the Secretary of War, written on the margin of the plat, contains these words: 'The public ground between Randolph and Madison streets, and fronting upon Lake Michigan, is not to be occupied with buildings of any description.' The plat shows that the southernmost lot of block 11, which lies between Michigan avenue and the lake and on the

north side of Randolph street, and is thus the northern boundary of the unsubdivided space, had a frontage of 73 feet on Randolph street. There are no figures at the south line of the addition to indicate the distance between the west line of Michigan avenue and the lake, but measuring on the plat according to its scale it was 200 feet. Michigan avenue is 90 feet wide.

“It will thus be seen that the land lying east of the west line of Michigan avenue, from Randolph street on the north to Park Row on the south, was by its original owners left unsubdivided; that that portion in fractional section 10 was expressly dedicated as ‘public ground’ ‘not to be occupied with buildings of any description,’ and that that portion in fractional section 15 was marked near one edge ‘Michigan avenue,’ and was held out to purchasers as ‘open ground—no buildings.’”

Concerning what is here quoted the court in connection therewith says:

“That this was equivalent to a dedication for such use and purpose has been repeatedly announced by this court (*Godfrey v. City of Alton*, 12 Ill. 29; *March v. Taylor*, 19 *id.* 634; *Smith v. Town of Flora*, 64 *id.* 93; *Maywood Co. v. Village of Maywood*, 118 *id.* 61) and where nothing appears to indicate for what particular use a grant or donation of land is made to the public, parol evidence is admissible to show the object to which it was to be devoted. (*Village of Princeville v. Auten*, 77 Ill. 325.) That the City of Chicago accepted the ground thus dedicated is undisputed. The statute provides that such dedicated lands shall be held in trust to and for the uses and purposes expressed or intended, and even in a common law dedication, which leaves the fee in the original owner, it is charged with the same rights and interests in the public which it would have if the fee were in the municipality. *Chicago, Rock Island and Pacific Railroad Co. v. City of Joliet*, 79 Ill. 25.”

We come now to consider the power of the Park Commissioners in their government and management of the parks under their control.

The Board of South Park Commissioners, like the City of Chicago itself, is a municipal corporation created by the sovereign State for the purpose of establishing, improving and maintaining a system of parks, boulevards, driveways and public places for the enjoyment, recreation and benefit of the general public; and the powers and authority of the Park Commissioners in these respects are plenary and exclusive of those of the City of Chicago. *McCormick v. South Park Commissioners*, 150 Ill. 516; *Illinois Malleable Iron Co. v. Lincoln Park Commissioners*, 263 Ill. 446; *West Chicago Park Commissioners v. City of Chicago*, 152 Ill. 392; *South Park Commissioners v. Chicago Street Railway Company*, 286 Ill. 504; *People v. Chicago Motor Bus Co.*, 295 Ill. 486.

It is said in *McQuillin on Municipal Corporations*, second edition, volume 3, section 1216 (1114), p. 715:

“Authority to buy and hold real estate, exists, however, only to the extent that it may be necessary to carry into effect corporate purposes. The two general classes of property which a municipal corporation may hold, include: First, that essential or convenient to function as a body politic and corporate. Second, that held for general convenience, pleasure and profit.”

Obviously, public parks come within the second subdivision here stated, viz.: property held for the convenience, pleasure and profit of the general public.

McQuillin on Municipal Corporations, second edition, section 1255 (1153), page 772, says:

“In its common and ordinary signification a public park is an open or enclosed tract of land adapted for, set apart, maintained at public expense, and devoted

to the purposes of pleasure, recreation, ornament and light and air for the inhabitants of the town or city near or in which it is located."

The powers of the South Park Commissioners are stated and described in the opinion of the Supreme Court in the case of *McCormick v. South Park Commissioners*, 150 Ill. 516, pp. 522-524. It is said:

"The act of 1869 (Private Laws, vol. 1, p. 358), creating the Board of South Park Commissioners, among other things provides (sec. 2) that 'said Board of Commissioners shall be a body politic and corporate, and shall have and enjoy all the powers necessary for the purposes of this act.' Section 4 provides for the selection, by the commissioners, of certain lands therein described, etc., 'which said land and premises, when acquired as provided by this act, shall be held, managed and controlled by them and their successors as a public park, for the recreation, health and benefit of the public, and free to all persons forever,' etc. By section 13 it is provided: 'The said board shall have the full and exclusive power to govern, manage and direct said park; to lay out and regulate the same; to pass ordinances for the regulation and government thereof; to appoint such engineers, surveyors, clerks and other officers, including police force, as may be necessary; to define and prescribe their respective duties and authority, fix the amount of their compensation, and, generally, in regard to said park, they shall possess all the power and authority now by law conferred upon or possessed by the common council of the City of Chicago in respect to the public squares and places in said city,' etc.

"By the section last quoted, the South Park Commissioners, in addition to the powers therein specifically enumerated, shall possess, generally, in regard to the park, 'all the power and authority now by law conferred upon or possessed by the common council of the City of Chicago in respect to the public squares and places in said city.' Consideration at length of the powers of the city council in the respect mentioned, under the then existing acts (charter of 1865,

and amendments), is not deemed important. While, in some particulars, differences are to be found, in the extent or manner of exercise of powers conferred upon the council, between the provisions of the charter and the general law of 1872, for the incorporation of cities and villages, now in force in Chicago, they are not material, for, in either case, in so far as such charter provisions might have any bearing upon the question, the powers of the common council were plenary and complete,—that is to say, that under the charter the common council, in respect of public squares and places, had authority and power as ample as that vested in them by the act of 1872; or, in other words, that the fee in such public squares and places being vested in the city in trust for the use of the general public, the common council of the city could improve and control them, and adopt all needful rules and regulations for their management and use. *Alton v. Transportation Co.*, 12 Ill. 38; *Chicago v. McGinn*, 51 *id.* 266; *Jacksonville v. Jacksonville Railway Co.*, 67 *id.* 540; *Carter v. Chicago*, 57 *id.* 285.

“By the plain language of the act, it seems clearly to have been the purpose of the legislature to invest the South Park Commissioners with powers, generally, at least, as full and exclusive, in regard to the park, as that conferred upon or possessed by the city council of Chicago in respect to public squares and places in said city, each holding by the same kind of tenure, and in relation to the respective subjects-matter referred to, the one clothed in the other.”

Some limitation upon the powers of the South Park Commissioners over that portion of Grant Park which was originally dedicated by the land owners must be recognized. Such restriction as by the terms of the dedication is put upon the use to be made of the land dedicated to the public is binding upon the Board of South Park Commissioners beyond the power of statute to remove or modify.

In respect to this limitation of power the Supreme Court in the case of the *Village of Riverside v. McLain*, 210 Ill. 308, at page 328, said:

“A distinction is also to be observed between cases, where the facts show that a public park has been created and established by a municipality under statutory provisions, and cases where the land has been dedicated for the purposes of the park by the original owner thereof. A pleasure driveway may be a legitimate feature of a public park created and established by a municipality, but in a dedicated park it is always a question of the intention of the donor. The latter class of parks cannot be cut up at the pleasure of municipal bodies, or by virtue of any statutory authority. The provisions in the statute in relation to parks, to which counsel for appellant refer, clearly relate to parks, created by a municipality or park commissioners, and not to parks dedicated at common law. Several cases are referred to by counsel, where a board of park commissioners are expressly given by statute exclusive powers over parks, and vested with absolute discretion to improve and maintain the same, as in their judgment may seem proper; in such cases, the board cannot be enjoined by a tax-payer on the ground of improper expenditures of public moneys from constructing speedways, or other kinds of pleasure driveways. (*Holtz v. Diehl*, 56 N. Y. Supp. 841.)”

Subject to such restrictions as to the use of public parks created by dedication, the Park Commissioners have the same full power to regulate the use of the park and to ornament and to do anything that they choose in their discretion with reference to it as a park, as in the case of parks created under statutory authority.

Certain restrictions placed upon the use of parts of Grant Park in the dedication thereof to the public are referred to and described in the case of the *City of Chicago v. Ward*, 169 Ill. 402-403, and heretofore set out in this opinion, are as follows:

“It will thus be seen that the land lying east of the west line of Michigan avenue, from Randolph street on the north to Park Row on the south, was by its original owners left unsubdivided; that that portions in fractional section 10 was expressly dedicated as ‘public ground’ ‘not to be occupied with buildings of any description,’ and that that portion in fractional section 15 was marked near one edge ‘Michigan avenue,’ and was held out to purchasers as ‘open ground—no buildings.’ ”

It is clear that by these restrictions in the dedication the Board of South Park Commissioners can not construct on these parcels of Grant Park here described structures or buildings of any kind. (*Ward v. Field Museum etc.*, 241 Ill. 496.) Subject to these restrictions affecting these particular tracts of land all the land is dedicated for public park purposes, and the Park Commissioners have the same general power over such lands for all park purposes as over lands of parks created under the statute.

In the case of *West Park Commissioners v. McMullen*, 134 Ill. 170, pp. 181, 182, the Supreme Court holds that the power conferred on the Park Commissioners is political in its nature, to be exercised in the discretion of these Commissioners, and courts of equity will not attempt to control the exercise of such power, except to preserve private right, or prevent gross abuse of it.

As said in the case of *Sherlock et al. v. Village of Winnetka et al.*, 59 Ill. 389, pp. 398, 399:

“There are some acts which a municipal corporation, while acting within the limits of its charter, may do, without being subject to the supervision of any court. Such acts are those done under its legislative and discretionary powers.

“The question as to the true boundary line between exemption from supervision, and liability to it, has received a thorough and critical examination in the courts of New York. *Milhan v. Sharp*, 15 Barb. 194;

Davis v. Mayor, 1 Duer. 453. In these cases, it was held that a municipal corporation, in reference to its private property, stands upon the same footing of other corporations; that its corporate property is held in trust for the benefit of its constituents, and the corporation is bound to administer such property faithfully, honestly and justly, and if it is guilty of a breach of trust by disposing of its valuable property, without any, or for a nominal, consideration, it will be regarded in the same light as if it were the representative of a private individual, or of a private corporation; that the mere fact in such a case, that the forms of legislation are used in committing such breach of trust, will make no difference in the character of the act. It will not be, in any sense, the exercise of a political power delegated for public purposes, and the privilege of exemption from judicial interference terminates where legislative action ends." See also same case, 68 Ill. 530.

Having determined the extent and character of the lands comprising the park system, and particularly Grant Park, coming under the jurisdiction of the South Park Commissioners, and having considered the general powers of such Commissioners in respect to the government and management of the parks, we may now consider the specific proposition of the power of the South Park Commissioners to construct and maintain an underground garage or public parking place for motor vehicles, to be open to the general public, in connection with their use and enjoyment of the park system, and the right of the Board in the maintenance of such underground garage or public parking place to collect a reasonable charge from the persons using such underground garage or parking place. The general statement of law as applied to this particular project is well stated in 28 Cyc., p. 938:

"Under a power to control and regulate parks the municipal authorities may provide for the pleasure, amusement, comfort, and refreshment of persons frequenting them, which in their discretion they may do

by granting privileges to private persons to furnish food or refreshments, or means of innocent entertainment, with the right to erect necessary structures incident thereto which will not interfere with the rights of the public, and may give a license to use a building in a park for the purpose of a restaurant, which rights and privileges may be made exclusive, the municipality in all cases retaining the right of regulation and control over the manner of conducting the business."

A case in point is *Bailey v. City of Topeka*, 97 Kan. 327. In this case the City of Topeka accepted a tract of land given to it for the purpose and on the condition that it should be used as a public park "for the benefit of the health, comfort and recreation of the citizens of Topeka and their friends, and such other orderly persons as may resort thereto." The deed of gift contained a provision that "said real estate shall be inalienable by said City of Topeka, either by way of deed, conveyance, lease, or in any other manner, and shall be forever held and used for the purposes aforesaid."

The case is set out in the opinion of the court as follows:

"The action of the city of which complaint is made consists of the granting to individuals, for pay, of exclusive rights within the park to operate refreshment and lunch stands, and to rent boats and provide suits, towels and rooms for bathers, at fixed prices. A free dressing pavilion is provided for bathers using their own suits and towels. Apparently there is nothing to prevent any one from using his own boat on the pond, should he so desire. We see nothing in the conduct referred to that is inconsistent with the public character of the park, or that conflicts with the terms of the gift. The exclusive character of the privilege conferred is not the basis of any legitimate objection. For as no one has a right to engage in the activities referred to except by permission of the city, no one is wronged by the monopoly created. The concessions granted do not amount to the leasing of any part of the park. (*The State ex rel. Attorney*

General v. Schweickardt, 109 Mo. 496, 19 S. W. 47.) Nor do they involve the loss of control over it by the public officers. Clearly it is not inconsistent with the conditions imposed by the donor of the property that visitors to the park should be afforded facilities for obtaining refreshments, for boating and for bathing. No reason exists why they should not pay a fair price for what they eat or drink, or for the boating or bathing equipment they use. The city might through its employes furnish these conveniences directly, collecting reasonable charges therefor. The fact that a profit resulted would not render the transaction objectionable. The incidental revenue would not characterize the transaction as commercial rather than governmental. Substantially the same result is accomplished by authorizing certain individuals to attend to the business of supplying the wants of the public with respect to the matters referred to, retaining so much of the proceeds as will fairly compensate them for their services and investment, and turning the residue over to the city."

The text above quoted from 28 Cyc. is cited with approval by the court in this case. The opinion continues on page 330:

"The suggestion is made that, if the present course of the city officers is held to be legitimate, there is nothing to prevent them at their pleasure from turning the park into a mere amusement resort, abounding in alluring catchpenny devices and dominated by a spirit of commercialism. This does not follow. That the power of regulation and management might be so abused as to warrant the interference of a court may be conceded. But we find in what has already been done no close approach to the danger line.

"It is argued that special statutory authority would be required to enable the city to pursue the course of which complaint is made. A member of the city commission is designated as the 'commissioner of parks and public property.' (Gen. Stat. 1909, sec. 1235, amended by Laws of 1913, ch. 84, sec. 2.) The commission is empowered to 'regulate' parks. (Gen. Stat. 1909, sec. 1280.) 'A park may be devoted to any use

which tends to promote popular enjoyment and recreation.' (3 Dillon's Municipal Corporations, 5th ed., sec. 1096, p. 1749.) The furnishing of the conveniences referred to is a proper incident to the management of the park, and the method followed is so naturally adapted to the desired end that it must be regarded as a matter of administrative detail, not necessary to be specifically authorized by the legislature."

Bryan v. Logan, 56 Va. 141, is a case where the park authorities leased half the park space for racing purposes for one year, with the right to extend the lease for an additional five years, for racing and training horses, which action was attacked on the ground of being a diversion of the public purpose in the use of the park. The court said with reference to this lease, at page 145:

"Again: Even if the power to make the lease in question had not been given by the act of the Legislature, still we would not brand it as void and illegal, because the use contemplated by the lease is not an unlawful diversion of a part of the park from the use in view of in its acquisition. The bill says the ground was acquired for park purposes 'for the health, pleasure and comfort of the people.' Racing horses is enjoyed by thousands and thousands of people, high and low, rich and poor. The use of the park for this purpose would give people recreation and pleasure, and is not foreign to the object for which it was purchased. *N. Orleans v. Louisiana Co.*, 140 U. S. 654. Note, too, that there was no sale depriving the city of title; but only a lease for one year, with right to extend the term five years. The lease covered only half of the forty-two acres. There were already a grand stand and race track. The lease gave exclusive control to the club of the part leased, reserving to the public access to the track for riding or driving with horses or vehicles, except on racing days and one week previous or when the track was in actual use by the club, or when its use would be improper by reason of bad weather. So it did not exclude the public wholly, but still allowed a partial use of it by the public. The lease gave the city \$300

annual rental, and fertilizers accumulated in the stables for the other ground. The city derived a benefit from the lease. A city may lease a part of a lot conveyed for court house purposes. It was held not a diversion from the legitimate use. *Billing v. Petersburg*, 8 Leigh 224. Parts of public buildings not needed may be leased. Note 8, 20 Am. & Eng. Ency. L. (2d Ed.) 1187."

In the comparatively recent case of *Blank v. Brown*, 217 N. Y. App. Div. 624, an attack was made upon an agreement entered into by the park commissioner of what is known as "Dream Land" park, which constituted a part of Coney Island. The case, as stated by the court in its opinion, at page 626, is as follows:

"By this agreement the park commissioner granted to his codefendant the privilege of operating the Dreamland parking space for automobile parking, purveying and other operations incidental to such use, subject to the approval of the commissioner of parks, for the period of three years, from March 15, 1926, to March 14, 1929, for the sum of \$32,500 for the first year, \$35,000 for the second year, and \$36,000 for the third year, payable in certain installments. Shea, the codefendant, was to keep the premises clean and satisfactory; pay all expenses of maintaining the same, including any structures contained therein, and provide all necessary appurtenances, heating or otherwise, for the operation of the structures and parking privilege. His rights were not deemed in any way to exclude park representatives from the property at any time, or the public from crossing the parking space to reach the water front, beach or boardwalk by way of established walks. He was required to make reports of all revenue received by him. The privilege was personal and could not be assigned. It was agreed that the permit, as it was called, might be canceled and annulled and the agreement terminated at any time by written notice from the commissioner. It was also provided in the instrument that the entire parking space should be under the control of the permittee, subject to the jurisdiction of the park commissioner. Shea was to be allowed to

charge a fee of twenty-five cents for each car parked during week days, except Saturdays and holidays, for a continuous period of five hours, with an extra charge of twenty-five cents for any period over the said continuous five hours. The rate for Saturdays and holidays was twenty-five cents for the first two hours and twenty-five cents additional for any number of continuous hours thereafter. These rates were higher than those which had been charged by the city, but it may be assumed that they were intended to offset the expense which the city had incurred for employees and otherwise. Shea was also permitted to operate purveying privileges in certain parts of the premises. The structures for such use were to be furnished by Shea and were not to exceed thirteen in number. By 'purveying' is meant that term in its general acceptation. He was also given permission to erect a gasoline station and auto accessory supply station upon the premises and, subject to the approval of the park commissioner, he could use the place for other activities, such as skating, etc. It was provided that Shea should not interfere in any way with the free use of the beach property fronting the park space nor with the boardwalk.

"The plaintiff claims that the privileges and rights given to Shea under this agreement were illegally granted by the park commissioner. Although it is in general terms claimed by the plaintiff that the pecuniary arrangements were improvident, the injunction was not granted on that basis. In fact, there were not sufficient facts before the court to warrant a finding of waste of public funds. The park commissioner claims that the arrangement is fair and reasonable. So the real inquiry here is whether or not the execution of this instrument by the park commissioner was an illegal official act.

"Under this instrument, by whatever name it may be characterized, the city does not lose control of this property, for Shea may be ousted on a moment's notice. There surely was no alienation of the city's property within the meaning of section 71 of the Greater New York Charter (Laws of 1901, chap. 466).

"In *Perrin v. N. Y. Central R. R. Co.* (36 N. Y. 120, 124) the following appears: 'A park is, in its

strict sense, a piece of ground inclosed for purposes of pleasure, exercise, amusement or ornament.' Since that time great changes have come over our affairs. The population has increased tremendously and facilities for amusement have necessarily developed. As incidental to opportunities for recreation and innocent amusement in public parks today, it is quite appropriate to furnish an opportunity for refreshment. As was said in *Gushee v. City of New York* (42 App. Div. 37, 41): 'That in the control and management of the public parks of a great city it is perfectly proper to furnish not only such innocent amusements as may enhance the pleasure of those who resort to the parks, but such opportunities for rest and refreshment for themselves and their animals as may be required, will not be disputed.' That was written only twenty-seven years ago when the possibilities of the present day extensive use of the automobile were not dreamed of. That this incidental use of parks is being made today without criticism or complaint everyone knows. The management of the city's parks is a private venture of the city. The city must determine for itself whether these incidental facilities are to be operated by the city or for it by private persons. (*Gushee v. City of New York, supra.*) It has been the invariable practice of the city to hire out these concessions. This practice has been countenanced for years without condemnation by local authorities or the courts. Of course, it is the duty of a public officer to let out such concessions under terms which are fair and just; but with that question we are not now dealing. It is urged that, although these incidental uses may be made of a park in connection with general park use, an entire park may not be devoted to that purpose. We are in accord with that view, and were that the situation here we should be constrained to affirm the order granting the injunction. But that is not the situation. 'Dreamland Park,' cut off as it is from use as a park, within the narrow definition of that term, by private ownership on its north and the boardwalk on the south, is really a part of a greater park, consisting of the great beach 500 feet wide, the boardwalk over the beach, and 'Dreamland Park' itself. To use this place as a parking space for automobiles is an appropriate incidental

use of the greater park of which 'Dreamland Park' is a part. The use of the automobile has been developed with extraordinary rapidity until today, although comparatively speaking, it came into general use but a few years since, it is stated upon reliable authority that there is in this country, at the present time, one automobile for every five persons. To Coney Island, probably the greatest water front amusement place in the world, there come on a single fine summer day hundreds of thousands of people in automobiles. These people necessarily must find a place to park their automobiles so that they may have an opportunity to indulge in those amusements offered to them by public as well as private enterprise. The beach itself is used by hundreds of thousands on a single day. The extent to which the automobile has come into common use has been recognized by the Legislature by providing in the charter of the village of Peekskill that the board of trustees of the village may issue permits for placing tanks and the containers for the storage of gasoline, kerosene or other oils within the bounds of a public highway and beneath the surface thereof and to permit arrangements for drawing therefrom upon the curb line of such street. (See *Matter of McCoy v. Apgar*, 241 N. Y. 71.) All over our city streets and public squares we find automobiles parked for long periods while their owners are away at distant points transacting their business. Public property is thus being used for private purposes. It is apparent that the use of the automobile requires a readjustment of the manner of the use of our city streets and places.

"We, therefore, hold, in light of the physical relationship of the so-called 'Dreamland Park' to the beach and the boardwalk, which, for all practical purposes, may be deemed a park, that the use of all the Dreamland property for the purpose of parking automobiles is a beneficial incident to the use of the greater park of which it is a part."

Further on in this opinion the court has this to say as to the sale of gasoline in such parking place as an incident to the use of the park:

“As to the sale of gasoline, since it would be dangerous to permit gasoline to be carried through the streets, and as it frequently happens that an automobile operator unexpectedly ‘runs short’ of gasoline, we are of the opinion that the sale of gasoline only, on these premises, to those who use them for parking purposes, is incidental to the use for those purposes.”

A statement of the law pertinent to the subject here under consideration is that contained in the case of the *People v. Chicago Motor Bus Co.*, 295 Ill. 486. This was an attack made upon an ordinance of the Lincoln Park Commissioners granting to the motor bus company the right to operate in the boulevards, parkways and streets under the control of said Commissioners. The court in its opinion says (p. 489):

“It is claimed the ordinance was not granted appellee for the purpose of carrying visitors into or out of Lincoln Park but was granted to appellee as a part of its general plan of transportation of passengers for hire in the City of Chicago, and that this was beyond the powers of the park commissioners. The powers of the park commissioners are not limited to granting the right to transport over the streets and boulevards under their control only passengers who alight or embark in the park. The system of boulevards under the commissioners’ control leading to or through the park are part of the park system maintained for the benefit of the public and for the improvement of the park and afford better facilities to the public for visiting and viewing the park.”

Upon the general law, as set forth in the foregoing opinion, and in view of the facts and the decisions of the courts thereon in the cases just set forth, we are of the opinion that it is clearly within the power of the Board

of South Park Commissioners by ordinance to provide for the construction and maintenance in the park system under their jurisdiction, and in Grant Park as well, an underground garage or public parking place for motor vehicles, and to maintain the same under their immediate supervision or control or by leasing to private interests upon proper letting for reasonable compensation to the Board, subject at all times to the control and supervision of the Board, such parking place to be open to the general public in connection with their use and enjoyment of the park system, and the right of the Board in the maintenance of such underground garage or public parking place to collect a reasonable charge from the persons using such underground garage or parking place.

(No. 6213—May 15, 1928—M. H. F.)

UNDERTAKERS, LICENSE.

Existing ordinances (sections 1899 and 1900 of the Municipal Code of 1922) require persons who practice undertaking to be licensed state embalmers and to have a practical knowledge of approved methods for carrying, preparing for burial or embalming dead bodies, although such persons conduct orthodox Jewish funerals only, prepare bodies for burial without embalming and do not prepare bodies of persons who have died from contagious or infectious disease.

Hon. Jacob M. Arvey, Alderman, 24th Ward:

In your communication of recent date, you request the opinion of this department upon the question whether an individual, who is not an authorized embalmer, may become a licensed undertaker under the ordinances of the

City of Chicago. You state that the person you have in mind has made application as a funeral director; that he is of Jewish faith and desires to conduct orthodox Jewish services only; that the embalming of bodies is not permitted by the orthodox Jewish faith, and hence, there should be no necessity for the applicant to be an embalmer.

In and by the Cities and Villages Act, chapter 24, Smith's Statutes, 1927, the City of Chicago is empowered to appoint a board of health and prescribe its duties and powers; to do all acts, make all regulations, which may be necessary or expedient for the promotion of health or the suppression of disease.

By State law, section 59 of chapter 111½, Smith's Statutes, 1927, it is provided that, "either the embalming of dead human bodies or the preparation for transportation of human bodies dead of a contagious or infectious disease, constitutes the practice of embalming."

Section 1899 of article XIII of chapter XXXIX of the Chicago Municipal Code of 1922, provides as follows:

"It shall be unlawful for any person to act as an undertaker, or to prepare a dead body for burial or cremation, or to manage a funeral, or to conduct, manage or be in charge of an undertaking room, store or place, or in any way to advertise or hold himself out to the public as an undertaker by card, sign, solicitation or otherwise, without first obtaining a license as an undertaker or funeral director as hereinafter provided."

Section 1900 provides in part as follows:

"Any person desiring a license to act as an undertaker, or to prepare dead bodies for burial or cremation, or to manage funerals, or to be in charge of an undertaking room, or to advertise or hold himself out to the public as an undertaker, or to solicit business as an undertaker, shall make application in writing therefor to the commissioner of health setting

forth therein the name and residence of such applicant and stating that the applicant is a licensed embalmer, and giving the number of such applicant's state embalmer's card, and the location of the room, store or place where such applicant intends to carry on or conduct the business of undertaking. Every such applicant shall also furnish to the commissioner of health evidence that he has knowledge of and is familiar with the laws and ordinances of the city and the rules and regulations of the department of health governing and concerning the removal, preparation and burial or cremation of the dead, and that such applicant has a practical knowledge of approved and sanitary methods of caring for dead bodies and preparing the same for burial or cremation, including the embalming and disinfection of dead bodies, the commissioner of health shall give to each applicant not less than three days' notice of the time when said applicant will be required to furnish said evidence of his qualifications. Said applicant shall further furnish to said commissioner evidence that the applicant is a resident of the City of Chicago or maintains an undertaking establishment in the City of Chicago, that he is of good moral character and a fit person to be licensed as an undertaker; and no license shall be issued unless the foregoing requirements have been complied with."

The reading of the above sections of the Municipal Code indicates to us that the City Council, as a salutary health measure, intended to license only such persons as undertakers who have a practical knowledge of approved and sanitary methods of caring for dead bodies and preparing the same for burial or cremation, including the embalming and disinfection of dead bodies, and who are duly licensed State embalmers.

It is, therefore, our opinion that the individual mentioned by you, in order to procure an undertaker's license under the City Ordinance now existing, would first be required to be a State licensed embalmer, even though he

engaged in the limited undertaking business of conducting orthodox Jewish funeral services only and preparing bodies for burial without embalming them and had nothing to do with the transportation of or preparation for burial of human bodies dead of a contagious or infectious disease.

Hence, an amendment to the present City Ordinance would seem to be necessary in order that this individual might be licensed.

(No. 6214—May 17, 1928—L. H.)

1 REFUND, VEHICLE LICENSE FEES.

Vehicle license fees in the sum of \$5,000 paid by the Bauer Cab Company may be refunded to the receiver who by mistake failed to have licenses transferred and secured new licenses.

2 VEHICLE LICENSE, TRANSFER, RECEIVERSHIP.

A vehicle license taken out shortly before the appointment of a receiver (in this case four days) may be transferred to the receiver on payment of \$1 under Section 4069 of the Municipal Code of 1922.

3 COMPROMISING CLAIMS, CITY COUNCIL, POWER.

The City Council has power to settle a claim which involves controverted questions and the City is confronted with the prospects of litigation although it is doubtful whether the parties can secure a judgment against the municipality.

Hon. Charles C. Fitzmorris, City Comptroller:

On September 26, 1927, we rendered an opinion on the validity of an order passed by the City Council on July 25, 1927 (Council Journal, p. 890), whereby the City

Comptroller was directed to issue a voucher in favor of the Chicago Title and Trust Company, as receiver of the Bauer Cab Company, for the sum of \$5,000, such payment to be a refund of vehicle license fees paid by the Bauer Cab Company. We held at that time that the license fees could not be refunded, even though the tags were never used by reason of the company going into the hands of a receiver.

Attorneys for the receiver have persistently urged this claim from that time to this. They state that suit will be brought on the claim if settlement is refused. We stated in our opinion that "there is much about this state of facts that would seem to make it inequitable for the City to refuse a refund of the fees." In other words, our opinion was based on a strictly technical application of the law, and we indicated therein that if a proper legal basis could be found for complying with the order of the City Council it would be just to do so. Practically the only legal basis on which we can say that it would be proper to heed the order of the City Council would be on the theory that there is a controverted question here, and the City is confronted with a suit. Under such conditions the City Council has the right to settle the claim.

While it is doubtful whether the parties could secure a judgment against the City, we feel that the case is one where the technical defense that we can set up should not be urged too strongly. This is especially true by reason of the fact that there are many claims for refunds sought, some of them running into large amounts. We believe that there is some danger of an adverse decision in a claim of this kind which will do the City a great deal of harm in cases where the equities are more on the side of the City. Therefore, we think that the equities in favor of this claimant should be taken into account. In addition

to this, there is another feature of the case that is now being insisted upon as a reason for changing our former opinion that did not figure before, and due credit should be given to that.

One of the principal arguments now made is that we failed to take into account the fact that under section 4069 of the Chicago Municipal Code of 1922 it would have been possible for the parties who took over the cabs from the receiver to secure transfers of the licenses at an expense of one dollar for each license. The attorneys for the receiver say they were prepared to urge this point when the matter was up before, but through some misunderstanding they were not given a hearing and the question was decided without giving them a chance to express their views. In justification of our attitude at the time we have only to say that no applications for transfers had been made, and we assumed that this feature of the situation would not be presented.

Section 4069 of said Code reads as follows:

“Whenever the vendor of any vehicle shall notify the city collector of his, her or their desire to transfer to the purchaser of any vehicle the license issued therefor, and when application for transfer of such license is made to the city collector by the purchaser of such vehicle, upon payment of a transfer fee of one dollar to the city collector, it shall be permissible for the city clerk, upon notification by the city collector of the payment of such transfer fee, and upon the surrender of the old license, to transfer such license to the assignee designated by the vendor, but for use only on the particular vehicle for which such license was originally issued.”

The vehicle licenses in question were taken out on January 6, 1927. The receiver was appointed on January 10, 1927, before the tags were attached to the vehicles. Unquestionably the transfers could have been made under

the terms of the above ordinance; but, the receiver took the position that there should be a refund, and it is claimed that under exactly the same circumstances the State made a refund for automobile registration fees.

The attorneys for the receiver say that there was nothing further done in the matter of the refund from the State except to notify the Secretary of State—and that thereupon the refund was at once allowed. While this cannot be considered as conclusive of the claimant's rights against the City, it does establish a precedent which should have some weight.

Considering the question before us in the light of the new facts presented, and having in mind that the City Council has already acted, we are not prepared to say that the Council's action was unlawful. With respect to claims that arise from *bona fide* disputes, the law is that:

“As a general proposition, municipal corporations have, unless specially restricted, the same powers to liquidate claims and indebtedness that natural persons have, and from that source proceeds power to adjust all disputed claims, and when the amount is ascertained to pay the same as other indebtedness.”
Dillon on Mun. Corp. (5th Ed.), sec. 822.

It appears that entirely new licenses for the year 1927 were taken out for most of these cabs. Hence there was no loss of revenue so far as the cabs that actually operated is concerned. In view of all these facts, we are of the opinion that the claim may properly be allowed, and that our letter of September 26, 1927, should be withdrawn.

Inasmuch as the order for refund was passed last year, the appropriations may not now be in such shape that the money is available, but we have no doubt the City Council will act in regard to the matter so that you can pay this sum if there is not at the present time an appropriation against which you can draw.

(No. 6215—May 17, 1928—L. H.)

1 BUILDINGS, DANGEROUS WALLS, FIRE DEPARTMENT.

A building which has been turned over by its owner to the Fire Department for experimental purposes is sufficiently in control of that department to require it to put the walls of the building, if dangerous, in a safe condition.

2 MUNICIPAL CODE OF 1922.

Section 403 applies to the Fire Department if given permission by the owner to use a building for experimental purposes.

Hon. Albert W. Goodrich, Fire Commissioner:

You have asked for further advice concerning the notice of the Department of Buildings with reference to the building at the southeast corner of Franklin street and Wacker drive.

When you submitted this matter to us before you informed us that you had received a letter from the Commissioner of Buildings, under date of February 7, 1928, in which it was stated that the walls on the front of the building in question were in bad condition and you were notified to "arrange to have walls all put in safe condition at once," and you asked for an opinion as to your rights and duties. We answered your letter, under date of February 11, 1928, explaining in a general way that the Commissioner of Buildings had extraordinary powers in such cases, and that when he notified the owners of the building of the unsafe condition and the danger was not removed, he had authority to call upon the Fire Commissioner to tear down the dangerous structure. This opinion was written on the theory that the owner of the building was at fault in not correcting the defect.

It now appears that the conditions about which the Commissioner of Buildings complains arose by reason of the experiments of the Fire Department. In explaining why you ask for further light, your letter says:

“In submitting this request to you originally I believe that I failed to inform you that this is the building at which the Fire Department demonstrated one of our new pieces of equipment some time ago. Prior to this demonstration the building was unoccupied and the windows were boarded up.

“The Fire Department in order to give this demonstration set fire to the building and it is for this reason that the building commissioner requests us to have the walls put in safe condition.

“I am anxious to know if it is our duty to comply with the building commissioner’s request in view of the circumstances set forth herein.”

This puts a different aspect on the matter, because the Fire Department is substituted for the owner under these conditions. Therefore, the section that applies is 403 of the Chicago Municipal Code of 1922, which requires the owner or person in possession or control of the building to immediately adopt precautionary measures so as to avert danger to the public. It is true that this section puts the duty on “the owner, agent or person in possession, charge or control,” and the officers and employees of the Fire Department do not exactly fit this designation. Nevertheless, when the building is turned over to you to the extent that you may experiment with it as you have done, it is our opinion that you are sufficiently in control to be subject to the requirement that you must see to it that the experiment shall not leave the walls in such an unsafe condition that they endanger the public.

Hence, we beg to advise you that the Commissioner of Buildings is within his rights in serving notice on you to have the dangerous walls put in safe condition.

(No. 6216—May 21, 1928—G. F. M.)

1 POLICE PENSION, DEDUCTIONS.

Under the Policemen's Annuity and Benefit Fund Act (the police pension law), deductions from the salary of a present employee must continue until the total accumulation to his credit is sufficient to purchase an annuity for him to which he is entitled irrespective of age and the time when the annuity has become fixed; and such deductions should cease only when the total accumulation from the employee's own salary deductions and from the City contributions with interest at 4 per cent reach the amount designated in section 17 of the Act.

2 THEORETICAL DEDUCTIONS, POLICEMAN'S PENSION.

Theoretical or assumed deductions under section 17 of the Policemen's Annuity and Benefit Fund Act consist of the amount which would have been to the credit of a present employee had deductions been made throughout his entire period of service prior to age 57 at the rate of three and one-half per cent of each salary payment (assuming that his salary throughout his entire service prior to January 1, 1922, was of the same amount as on that date) together with interest at the rate of four per cent per annum on each such assumed deduction.

Retirement Board, Policemen's Annuity and Benefit Fund:

Replying to your request for an opinion as to whether or not deductions shall be made from the salary of a present employee for age and service annuity purposes after such employee has attained the age of fifty-seven (57) years and after his annuity has been fixed, the following is submitted:

Section 17 of the Policemen's Annuity and Benefit Fund Act provides, in the second paragraph thereof, that—

“Three and one-half per cent ($3\frac{1}{2}\%$) of each payment of the salary of each present employee shall be deducted and contributed to the Annuity and Benefit

Fund herein provided for. Such deductions shall be made at the time such payments of salary are payable and shall be continued while such present employee shall be in the service until the amount so deducted from the salary of such present employee, together with the amount deducted from his salary or otherwise paid by him according to law * * * with interest on both such amounts at the rate of 4 per cent per annum, shall be equal to the sum which would have accumulated to the credit of such present employee for age and service annuity purposes from sums deducted from his salary if deductions from his salary for such purposes at the rate herein stated had been made during the entire period of his service until his attainment of an age of fifty-seven (57) years, together with interest upon such sum at the rate of 4 percent per annum for the period of time subsequent to his attainment of an age of fifty-seven (57) years."

The last sentence of the last paragraph of section 17 provides that—

"Any accretion by way of interest or otherwise upon * * * any deduction from the salary of such present employee made after the amount of such annuity shall be fixed shall not be credited to such employee for the purpose of increasing the amount of annuity to which such present employee shall have a right."

Section 37 of the Act provides that—

"If at the time the amount of annuity for any policeman shall be fixed, there shall be to the credit of such policeman, for the purpose of providing such annuity, an amount in excess of that necessary to provide an annuity equal to 75 per cent of the highest salary (as hereinbefore stated in this Section) of such policeman * * * a part of such excess amount proportionately equal to that part of the entire amount to the credit of such present employee for such annuity purposes, which the sum that shall have resulted from deductions from his salary required by this Act bears to such entire amount shall be re-

funded and paid at that time to any such policeman who shall be a present employee."

It is very evident from the above quoted provisions of the law governing police pensions that deductions from the salary of a present employee shall be made for age and service annuity purposes until the total accumulation to his credit is sufficient to purchase the annuity to which he may become entitled after such annuity has been fixed. In arriving at the theoretical amount indicated by the words—

"The sum which would have accumulated to the credit of such present employee for age and service annuity purposes from sums deducted from his salary if deductions from his salary for such purposes at the rate herein stated had been made during the entire period of his service until his attainment of an age of fifty-seven (57) years,"

the assumed deductions from his salary during the entire period of his service prior to the age of fifty-seven (57) years should each be improved with interest at the rate of 4 per cent per annum from the date when such deduction is assumed to have been made, as any such deduction which was actually so made bears interest at 4 per cent per annum, according to the provision of the second paragraph of section 17; if the actual deduction from his salary is improved with interest at 4 per cent per annum, then the assumed deduction should bear a like interest.

What these amounts may be and how long it may require deductions to be made from the salary of a present employee before his total accumulations "shall be equal to the sum which would have accumulated, etc.," is a matter for the Actuary to compute in each case.

I am of the opinion that deductions shall continue to be made from the salary of a present employee until such time as the total accumulation to his credit shall be suffi-

cient to purchase for him an annuity as provided for in section 17 of the Act, irrespective of the age of such present employee and irrespective of the time when his annuity shall be fixed. In other words, the evident purpose and intent of the Act is that each policeman shall pay for his own annuity, if he remain in the service sufficiently long so to do; and that deductions shall be made from his salary for this purpose during his entire period of service, irrespective of his age, until such result is accomplished.

I am of the further opinion that deductions from the salary of a present employee in the police service shall cease to be made when the total accumulation to the credit of such employee from his own salary deductions and from City contributions, are of the amount provided for in section 17 of the Act.

The foregoing opinion is based not only upon the provisions of sections 17, 27 and 37, but also upon the basic construction of the Annuity and Benefit Fund itself, as indicated not only in the sections referred to but also in section 16 of the Act which provides that deductions shall be made from the salary of a future entrant until he shall attain an age of fifty-seven (57) years, and that each such deduction shall be improved with interest at the rate of 4 per cent per annum until such future entrant shall attain an age of fifty-seven (57) years. It is the evident intention of the Act that annuities shall be paid for by future entrants and present employees upon the same basis and that neither class shall be discriminated against so far as relates to his annuity accumulations.

(No. 6217—May 21, 1928—F. J.)

1 VACANT LOTS, CLEANING.

The Commissioner of Public Works has no power or jurisdiction in the matter of cleaning privately owned vacant lots.

2 BUILDINGS, RUBBISH, FIRE PREVENTION BUREAU.

The dumping of rubbish or inflammable material and its accumulation in or outside of buildings and adjacent to them is a violation of section 1529 of the Municipal Code of 1922 and may be abated as a nuisance by the Fire Prevention Bureau.

3 NUISANCE ABATEMENT, COMMISSIONER OF HEALTH.

Rubbish which has been permitted to accumulate on vacant lots to the extent that it has become a nuisance may be ordered to be removed by the Commissioner of Public Health under section 2195 of the Municipal Code of 1922.

4 NUISANCES, COMPLAINT.

Any citizen may complain to the Department of Health or to the Fire Prevention Bureau against owners or their agents who permit their vacant property to be used for dumping purposes to an extent as to create a nuisance and danger to others.

Hon. Richard W. Wolfe, Commissioner of Public Works:

Your communication of the 8th instant enclosing copy of letter received from Mr. L. A. Sherwin to the Honorable William Hale Thompson, Mayor, relative to the unsightly condition of the vacant lot about half way between 75th and 76th streets, on the east side of Stony Island avenue, received. Mr. Sherwin states in his letter, among other things, that the lot is being used for a dumping ground for "all kinds of rubbish and trash on this lot, broken down automobiles, and thousands of empty, dirty and rusty cans." He further states, "on this lot several stores have been burning mattresses and rubbish."

You conclude your letter with three questions: First, What is the duty and jurisdiction of the Department of Public Works in the matter of cleaning vacant lots where rubbish of all kinds, including wrecked automobiles, has accumulated? Second, What jurisdiction have other departments in the City Government in cases of this nature? Third, What recourse have neighbors against lot owners, who permit their vacant properties to be used for the dumping of rubbish?

We will take your questions up in the order stated above.

Section 3211 of the Chicago Municipal Code of 1922, in setting forth the powers of the Commissioner of Public Works states:

“The said Commissioner shall have charge of all public improvements, commenced * * * and shall have power, subject to the ordinances of the City, to regulate and control the manner of using the streets, alleys, highways and public places of the City, * * * and shall have authority to cause the prompt repair of the streets, alleys, highways and public places, * * *.”

Section 3212 of the Chicago Municipal Code of 1922, in setting forth the duties of the Commissioner of Public Works states:

“It shall be the duty of said Commissioner of Public Works, subject to the provisions hereof and ordinances of the City, to take special charge and superintendence of all streets, alleys and highways in the City, and of all walks and crosswalks, bridges, viaducts, docks, wharves, public places, public landings and public grounds in the City: * * *.”

We are of the opinion that the above quoted sections are so clear and definite in setting out the rights, powers, jurisdiction and duties of the Commissioner of Public Works that there can be no question as to those powers

being restricted to public property and not to property owned privately, and we, therefore, advise you that your department has neither duty nor jurisdiction in the matter of cleaning vacant lots belonging to private owners.

As to question number 2: Section 2195 of the Chicago Municipal Code of 1922, clearly sets forth the duty of the Commissioner of Health on the subject of nuisance, and states:

“It shall be the duty of the Commissioner of Health to serve notice, in writing, upon owner, occupant, agent, or person in possession, charge or control of any lot, building or premises, in or upon which any nuisance may be found, or who may be the owner or cause of any such nuisance, requiring them, or either of them, to abate the same in such manner as he shall prescribe, within a reasonable time: * * *.”

It is our opinion that under this particular section the Health Department has unquestionable jurisdiction in cases of the nature described in your communication and set forth more fully in Mr. Sherwin's letter.

Section 1529 of the Chicago Municipal Code of 1922, in setting forth the duties, powers, rights, and jurisdiction of the Fire Prevention Bureau, states:

“That rubbish shall not be allowed to accumulate in any part of any building, nor outside of and adjacent to any building.”

Section 1532 of the Chicago Municipal Code of 1922, clearly defines what constitutes a nuisance under the Fire Prevention Ordinance, stating:

“Any building, structure, inclosure, place, or premises perilous to life or property by reason of the nature, condition or quantity of its contents or its use * * * is hereby declared to be a nuisance and within the meaning of the word as used in this ordinance, and the Chief of Fire Prevention and Public

Safety is empowered and directed to cause any such nuisance to be abated."

Section 1538 (B) of the Chicago Municipal Code of 1922, on the subject of duties, powers and rights of the Fire Prevention Bureau, states:

"It shall be unlawful for any person to burn or ignite, or cause or permit to be burned or ignited, in any yard, lot or courtway, within the City, any inflammable rubbish, refuse, or material which may endanger any adjoining building, fence or shed by communication of fire thereto."

It is our opinion that under the above set forth sections, the accumulation of rubbish of inflammable nature and the burning of inflammable material such as mattresses, could properly result in a nuisance and hazard clearly within the jurisdiction of the Fire Prevention Bureau.

As to question number 3: It is our opinion that any citizen may at any time lay a complaint before the Department of Health or the Fire Prevention Bureau against lot owners or their agents, who permit their vacant properties to be used for dumping purposes, whereby a condition is created detrimental to the health of the community or to the property of the adjoining owners, and under such complaint the respective departments of the City Government may proceed to abate the nuisance.

As a matter of policy, if for no other reason, this department cannot be concerned in private litigation of any kind or nature, nor do we believe that it is within our scope of duty to offer an opinion as to the private civil rights of one citizen against another.

(No. 6218—May 23, 1928—M. H. F.)

1. MOTOR VEHICLES, REGULATION.

The weight of motor vehicle loads is regulated by statute (section 3 of the Motor Vehicle Act) which supersedes any repugnant or inconsistent ordinance regulation.

2. MOTOR VEHICLE LAW.

Section 3 of Motor Vehicle Law (Cahill's Stat. 1927, p. 1711) was intended to establish uniformity in the matter of weights of vehicles and their loads.

3. TRAFFIC ORDINANCE.

Section 59 of the Traffic Ordinance of March 16, 1927 (Council Proceedings, p. 5841), in so far as it conflicts with section 3 of the Motor Vehicle Law by restricting the weight of self-propelled freight carrying motor vehicles to 30,000 pounds instead of 40,000 pounds is inoperative.

4. STREETS AND ALLEYS, CITY COUNCIL, POWER.

The power of the City Council over streets and alleys although broad is subject to the paramount power of the Legislature, as the fee in the streets and alleys is vested in the municipality in trust for all the people of the State.

*Hon. Max Adamowski, Chairman, Committee on Efficiency,
Economy and Rehabilitation:*

In your communication of recent date you state that it is your understanding that section 59 of the City Ordinance passed March 16, 1927, fixes the maximum gross weight, including the weight of the vehicle and load thereof, of any self-propelled, freight-carrying motor vehicle at 30,000 lbs., and that section 3 of the Illinois Motor Vehicle Law, in force July 1, 1927, provides in part that the gross weight, including the weight of the vehicle and maximum load of any self-propelled six or more wheel vehicle shall not exceed 40,000 lbs. You request the opinion of this department upon the question whether the

State law which permits 40,000 lbs. provided six or more wheel equipment is used, is controlling within the City of Chicago, or whether the municipality under its above mentioned ordinance may restrict the maximum gross weight of any self-propelled, freight-carrying motor vehicle to 30,000 lbs.

Such portions of the above mentioned sections, as are material to the inquiry, provide as follows:

“Section 59. The maximum gross weight, permitted on the road surface through any two wheels on the same axle of any freight-carrying motor vehicle shall not exceed twenty-four thousand pounds, nor shall it exceed one thousand pounds per inch of width of tire upon such wheels in actual contact with the surface of the road. Provided, further, that the gross weight, including the weight of the vehicle and load thereof, of any self-propelled freight-carrying motor vehicle shall not exceed thirty thousand pounds; and the gross weight of any trailer, including the weight of the vehicle and load thereof, shall not exceed thirty-two thousand pounds; and the gross weight of any semi-trailer together with self-propelled tractor vehicle thereunto attached, including the weight of the vehicles and load thereof, shall not exceed forty-five thousand pounds.” 1927 Council Proceedings, p. 5841.

“Sec. 3. (1) The maximum gross weight to be permitted on the road surface through any axle of any vehicle shall not exceed sixteen thousand pounds, nor shall it exceed eight hundred pounds per inch of width of tire upon any one wheel. Provided, further, that the gross weight, including the weight of the vehicle and maximum load of any self-propelled four wheel vehicle shall not exceed twenty-four thousand pounds. The gross weight, including the weight of the vehicle and the maximum load, of any self-propelled six or more wheel vehicle shall not exceed forty thousand pounds, nor shall any two axles lie in the same vertical plane, nor shall the axle spacing be less than forty inches from center to center; provided, that the axle arrangement shall be such that

the proportion of the gross load carried on any axle shall remain constant; and the gross weight, including the weight of the vehicle and maximum load, of any trailer or semi-trailer vehicle pulled or towed by a motor vehicle shall not exceed thirty-two thousand pounds.

“(2) Weight limits 50 per cent above those provided for herein may be permitted by ordinance in cities having a population of more than 20,000, but such increase shall not apply to vehicles when outside the limits of such a city, nor shall the gross weight of any vehicle operating over any street or highway of this State exceed forty thousand (40,000) pounds.” Cahill’s Stat. 1927, p. 1711.

From a reading of the foregoing section 3 of the State law it would appear that the Legislature intended to and has legislated upon the subject of weights of motor vehicles and furthermore, that it has manifested its intention that the State law should govern except in the matter of the 50 per cent increase (but not exceeding 40,000 pounds gross weight of any vehicle) permitted by ordinance in cities having a population of more than 20,000.

It is our opinion that the purpose of the Illinois Motor Vehicle Act was to establish uniformity in the matter of weights of vehicles and their loads, and hence, to supercede any repugnant or inconsistent ordinance regulations. That the Legislature has this power is, we believe, without question.

It was held in the recent case of *Wilmot v. City of Chicago*, 328 Ill. 552, that as the fee in streets and alleys is vested in the local municipality in trust for all the citizens of the State and not merely for local use, the Legislature has supreme control over them unless restrained by constitutional limitation.

By the Cities and Villages Act, chapter 24, Smith’s Statutes, 1927, the City of Chicago is given very broad

authority over its streets, but this authority and control is not exclusive and is subject to the paramount power of the State. Furthermore, the Cities and Villages Act, like any other act of the Legislature, is subject to change by later enactments.

In *Chicago and Southern Traction Company v. Illinois Central Railroad Company*, 246 Ill. 146, it was held that while a municipal corporation is vested with the control of the streets within its corporate limits, such control is not exclusive but is subject to the paramount power of the State. The court in its opinion said:

“The authority vested in any incorporated city or village is there vested as an agency, only, the corporation itself being a mere creature of the State and existing only by authority of the legislature and at all times under its paramount supervision and control. ‘These municipal corporations are instrumentalities of the State, exercising such powers as are conferred upon them in the government of the municipality. Their power is measured by the legislative grant, and they can exercise such powers only as are expressly granted or are necessarily implied from the powers expressly conferred. The legislature, representing the great body of the people of the State, when no private right is invaded or trust violated, may repeal the law creating them, or exercise such control in respect of the streets, alleys and public grounds within the municipalities of the State as it shall deem for the interest of the people of the State.’ (*Smith v. McDowell*, 148 Ill. 51.) ‘Cities, towns, etc., possess and can exercise only such authority and control in regard to their streets as may be delegated by the legislature. They have no inherent power or authority in this respect and can act only in subordination to the paramount authority of the legislature.’ *City of Chicago v. Rumsey*, 87 Ill. 348.

“While a municipal corporation is vested with the control of the streets within its corporate limits, such control is not exclusive but is subject to the superior

control which may be exercised by the State at any time.”

An ordinance may supplement the statute, but it must not conflict with or operate to nullify the State Law. McQuillin Municipal Corporations (2d ed.), vol. 3, sec. 924.

If attempt were made under the ordinance to restrict the gross weight of all self-propelled, freight-carrying motor vehicles to 30,000 lbs., the effect would be to nullify that provision of the State law which permits a maximum weight of 40,000 lbs., provided six or more wheel equipment is used.

Hence, it follows that where there is a State law relating to the subject, anything contained in the ordinance inconsistent or in conflict with the State law would have to yield to the paramount State law.

In the provisions above referred to there appears to be such a conflict, and it is our opinion that the provision of the State law which permits a gross weight of 40,000 lbs., provided six or more wheel equipment is used, is the paramount regulation and is controlling upon the City of Chicago.

(No. 6219—May 24, 1928—L. H.)

1 RESTAURANTS AND HOTELS, LICENSE.

Restaurants and hotels in which public dancing is permitted are public places of amusement within the meaning of section 202 of the Municipal Code of 1922 and require a City license.

2 MUNICIPAL CODE OF 1922.

Section 202 is valid and includes in the term "public place of amusement" hotels and restaurants which permit dancing by patrons.

3 WORDS AND PHRASES.

The term "public place of amusement" in section 202 of the Municipal Code includes restaurants and hotels where dancing by patrons is permitted.

Hon. George Seebacher, Superintendent, Department of License:

We are in receipt of your letter of recent date in which you inquire about the right of the City to license hotels and restaurants that conduct dances for their patrons. Your question is directed especially to the point as to whether or not you can compel these places to take out licenses under sections 202-210 of the Chicago Municipal Code of 1922, regulating "public places of amusement." Section 202 of the Code reads as follows:

"The term 'public place of amusement,' as used in this article, shall be construed to include and to mean any building, hall, room, place or enclosure, where food or drink is served, to which the general public may be admitted either with or without the payment of a charge or admission fee, where such public may engage in or witness the performance of any theatrical entertainment, exhibition, show, amusement, dance, skating, or entertainment, other than musical."

You state that up to this time you have construed this section to mean that restaurants which reserve floor space for dancing with music by patrons come within the terms of the ordinance; that recently, however, such places as the Congress, the Blackstone, and other hotels and restaurants which have dance space reserved where patrons dance to music furnished by a full orchestra, decline to take out licenses for public places of amusement. Your letter further says that the places in question make no extra charge for dancing and have no paid entertainers, and that the claim is made that a recent Supreme Court decision holds that dancing by patrons is only incidental to the operation of a restaurant and that therefore it cannot be licensed. We are not informed as to what decision is referred to in this matter, but if it is any one of the cases which we mention in this opinion we feel certain that this case has been misunderstood.

Section 202 explicitly includes the class of places of which you speak. Consequently the question you ask is not one that calls for an interpretation of the ordinance, but it must be understood as raising the point whether, under the construction placed on it, the ordinance is valid. We are satisfied that it is, and we do not believe that any decision of the reviewing courts of this State can be interpreted as holding otherwise.

Dancing is an amusement within the provisions of clause 41 of section 1, article V, of the Cities and Villages Act, authorizing the City to "license, tax, regulate, suppress and prohibit" shows and amusements. (*City of Chicago v. Green Mill Gardens*, 305 Ill. 87.) Under the broad powers given, the City has as full and complete authority over the subject-matter as the Legislature itself possesses. (*Metropolis Theater Co. v. City of Chicago*, 246 Ill. 20; *Nahser v. City of Chicago*, 271 Ill. 288.) Hence, no ques-

tion of the amount of the license fee or the power to regulate with a proper ordinance can arise.

The question of the rights of the City Council with respect to dancing in restaurants first came up in the case of *City of Chicago v. Drake Hotel Co.*, 274 Ill. 408. In this case our Supreme Court held that neither the City nor the Legislature had power to prohibit dancing in restaurants, but it did not hold that the City lacked power to license and regulate it as an amusement.

"The matter here presented for determination, therefore, resolves itself into the question whether the city council of the City of Chicago has the power to prohibit dancing in restaurants by the patrons thereof where no fee is charged for the privilege. *The question whether the city council has the power to regulate dancing in such restaurants is not presented.*" *City of Chicago v. Drake Hotel Co.*, 274 Ill. 408-412.

It will be seen from the above that the question in the *Drake Hotel case* was whether a restaurant can be prohibited from having dancing unless it is located in a licensed dance hall. The court said of the ordinance involved in that case that:

"By its express terms it is an absolute prohibition against permitting the patrons of a restaurant to indulge in dancing while the same is open to the general public as a place where the public may purchase refreshments, unless the restaurant is conducted in a licensed dance hall" (p. 411).

Thus, it appears, not only from the decision itself but from the dissenting opinion of Justices Dunn and Cartwright as well, that the sole question decided in that case had nothing to do with the right of the City to license and regulate dancing in restaurants.

Again, in a later case the same court held that an ordinance somewhat similar in its provisions to the one in

question was applicable to restaurants. In the case of *City of Chicago v. Green Mill Gardens*, 305 Ill. 87, 93, the defendant sought to void the ordinance on the theory that clause 58 of section 1, article V, of the Cities and Villages Act, which authorizes the City "to regulate places of amusement," was not intended to include places where food and drinks were served. But the court said of this:

"But it is argued that the legislature by paragraph 58 of section 5 did not intend to include places where food and soft drinks, only, are served, as places of amusement. That may be true, but appellee did more than that; it permitted dancing to the music of an orchestra after one o'clock A. M., and it cannot escape from that charge because it sold soft drinks and conducted a restaurant also. If it can, why may not an owner of a restaurant who sells soft drinks defeat on the same line of argument a charge that he was illegally selling intoxicating liquor or conducting a gaming house?"

The case of *Potson v. City of Chicago*, 304 Ill. 222, is frequently referred to in connection with the question raised here, but it had nothing to do with the power of the City respecting amusement licenses—it hinged on the point of whether or not the City had power to license restaurants.

The case of *People ex rel. Pershing Palace v. Dever et al.*, 237 Ill. App. 65, is also often spoken of as one that passes on the question of the right to license dances in restaurants, but that is not the fact. In that case the Pershing Palace had applied for a license as a public place of amusement, and the application had been refused because the place did not conform to the building requirements for dance halls. The only question in the case was whether the place should be construed as a dance hall as defined by section 448-j of the Municipal Code. On this point the court said:

“A dance hall, as contemplated by clause (j), in our view, would be a public hall specifically devoted to dancing, not necessarily used exclusively for dancing but primarily and predominantly so used. We recognize that there would be instances where it would be difficult to say with certainty that a hall used for dancing in connection with other purposes was or was not a dance hall. In other words, where a hall was used for dancing and also for other purposes, the extent of the different uses might be so nearly equal that reasonably it could not be determined what was the decided character of the hall. But in the case at bar the use as a restaurant of the part of the building leased to the petitioner largely preponderates over the use for dancing. The line of demarcation between the two uses is clear and distinct. The decided predominant use is that of a restaurant. The use for dancing is an incident in comparison with the principal use as a restaurant.”

The court held that the City was bound to issue a license to the Pershing Palace as a public place of amusement. This case was affirmed by the Supreme Court on certiorari. Thus, instead of holding that a license was not required, the court actually held that the place should be granted a license as a public place of amusement.

While there seems to be no case in the Illinois reports (except perhaps the *Green Mill case*) which expressly holds that the City has power to license a restaurant as a place of amusement, the necessary inference from the cases cited, and other cases involving amusement licenses, is that such power exists. This power does not depend on the size of the place reserved for dancing, or in the proportion of the patrons that indulge in dancing. It depends on whether or not the general public is afforded a place to dance and is invited to do it by signs, notices on the menus, or even the mere playing of dance music.

On the other hand, it does not follow that every place where a dance is conducted under a license for a public

place of amusement is to be construed as a dance hall requiring special building provisions applicable to dance halls as set forth in section 448j of the Code. We are informed that the heads of departments sometimes refuse to give their consent to the issuance of a license because the place does not conform to those requirements. That is another question that may be considered when it comes before us, but it is sufficient for the purposes of this opinion to say that such building regulations do not always apply.

We therefore beg to advise you that the interpretation you have placed on section 202 is correct, and that hotels and restaurants which conduct dances open to the general public are required to conform to its provisions.

(No. 6220—May 25, 1928—G. F. M.)

1 POLICE PENSIONS, DEDUCTIONS.

Section 17 of the Policemen's Annuity and Benefit Fund Act requires the taking from each payment of salary of a present employee $3\frac{1}{2}$ per cent until the amount actually deducted and the amount otherwise paid in according to law with 4 per cent interest on both amounts equal the theoretical salary deductions of such employee during the entire period of his service up to 57 years of age.

2 POLICE PENSION, REFUND.

A present employee is entitled to a refund under section 37 of the Policemen's Annuity and Benefit Fund Act only when the total sum in actual salary deductions together with the City's contributions constitute an accumulation in excess of an amount necessary to purchase his approximate allowable annuity at the time the annuity becomes fixed.

3 POLICEMEN'S ANNUITY AND BENEFIT FUND ACT.

Section 17 of the Policemen's Annuity and Benefit Fund Act leaves the amount of salary deductions to be determined in each case according to its particular facts and does not fix a definite date upon which such deductions shall cease to be made.

Retirement Board, Policemen's Annuity and Benefit Fund:

Replying to your request for an opinion on certain questions raised by some members of the Police Department classified under the provisions of the Pension Act of 1921 as "present employees," the following is submitted:

Your letter states that Sergeant John R. Ryan, representing some of the present employees, has made the following contentions on their behalf:

1. That the City has no right to make deductions from their salaries for age and service annuity purposes after the amount of the age and service annuity of any "present employees" has been fixed;

2. That the theoretical accumulation referred to in the second paragraph of section 17 should consist solely of principal, and not principal plus interest on the separate theoretical $3\frac{1}{2}$ per cent salary contribution;

3. That present employees are entitled under section 37 of the Act to a refund of deductions made from their salaries subsequent to the date on which their respective annuities were fixed.

1st. Section 17 of the Policemen's Annuity and Benefit Fund Act provides, in the second paragraph thereof, that—

“Three and one-half per cent ($3\frac{1}{2}\%$) of each payment of the salary of each present employee shall be deducted and contributed to the Annuity and Benefit Fund herein provided for. Such deductions shall be made at the time such payments of salary are payable and shall be continued while such present employee shall be in the service until the amount so deducted from the salary of such present employee, together with the amount deducted from his salary or otherwise paid by him according to law * * * with interest on both such amounts at the rate of 4% per annum, shall be equal to the sum which would have accumulated to the credit of such present employee for age and service annuity purposes from sums deducted from his salary if deductions from his salary for such purposes at the rate herein stated had been made during the entire period of his service until his attainment of an age of fifty-seven (57) years, together with interest upon such sum at the rate of 4% per annum for the period of time subsequent to his attainment of an age of fifty-seven (57) years.”

The last sentence of the last paragraph of section 17 provides that “any accretion by way of interest or otherwise upon * * * any deduction from the salary of such present employee made after the amount of such annuity shall be fixed shall not be credited to such em-

ployee for the purpose of increasing the amount of annuity to which such present employee shall have a right."

It is evident from the above quoted provisions of the Act that the date of fixing of the amount of annuity to which the respective present employee shall be entitled, has no bearing whatever upon the date on which salary deductions shall cease to be made. Section 17 of the Act specifically provides that such deductions shall continue to be made until the amount so deducted, together with the amount deducted from his salary or otherwise paid by him according to law, with interest on both such amounts at the rate of 4 per cent per annum shall be equal to the amount which would have accumulated to his credit for age and service annuity purposes from salary deductions if such deductions had been made for such purposes during the entire period of his service until his attainment of an age of fifty-seven (57) years, together with interest on each such deduction.

What these amounts may be and how long it may require deductions to be made from the salary of a present employee before his total accumulations "shall be equal to the sum which would have accumulated," etc., is a matter for the Actuary to compute in each case. The fixing of the maximum annuity obtainable under the provisions of section 27 of the Act has no relation to nor bearing upon the ascertainment of "the sum which would have accumulated," etc. They are totally separate and distinct matters.

2d. In arriving at the theoretical amount indicated by the words "the sum which would have accumulated to the credit of such present employee for age and service annuity purposes from sums deducted from his salary if deductions from his salary for such purposes at the rate herein stated had been made during the entire period of

his service until his attainment of an age of fifty-seven (57) years," the separate assumed deductions from his salary during the entire period of his service prior to age fifty-seven (57) years should each be improved with interest at the rate of 4 per cent per annum from the date when each such deduction is assumed to have been made, as any such deduction which was actually so made bears interest at 4 per cent per annum, according to the provision of the second paragraph of section 17; if the actual deduction from his salary is improved with interest at 4 per cent per annum, then the assumed deduction should bear a like interest. There must be a common basis for computation in making a comparison of various sums of money; that is, in reaching a comparison between theoretical salary deductions and actual salary deductions, interest must be computed on both items when it is computed on either item.

Section 16 of the Act provides that deductions shall be made from the salary of a future entrant until he shall attain an age of fifty-seven (57) years, and that each such deduction shall be improved with interest at the rate of 4 per cent per annum until such future entrant shall attain an age of fifty-seven (57) years. The theoretical deductions of present employees should be likewise improved with a like interest.

3d. So far as concerns the right of present employees to receive and be paid a refund of salary deductions under the provisions of section 37 of the Act, it will be noted that section 37 provides for such refund to be made only at the time the amount of annuity for such present employees is fixed.

Section 37 of the Act provides that "*if at the time the amount of annuity for any policeman shall be fixed, there shall be to the credit of such policeman, for the*

purpose of providing such annuity, an amount in excess of that necessary to provide an annuity equal to 75% of the highest salary (as hereinbefore stated in this section) of such policeman * * * a part of such excess amount proportionately equal to that part of the entire amount to the credit of such present employee for such annuity purposes, which the sum that shall have resulted from deductions from his salary required by this Act bears to such entire amount shall be refunded and paid at that time to any such policeman who shall be a present employee."

So far as concerns a present employee, this provision applies when the maximum annuity of a present employee payable from actual salary deductions and contributions by the City is found to be in excess of 75 per cent of his salary (as defined in the Act) on the date and at the time *his annuity is fixed*.

This can only occur in a case where the actual contributions or salary deductions by a present employee exceed the theoretical deductions referred to in the second paragraph of section 14 of the Act.

I have examined the computations submitted by Sergeant Ryan and I assume that it is the system followed by "present employees" generally; but the basis used is incorrect. Section 14 of the Act reads that "for all purposes of this Act it shall be assumed that the annual salary of any present employee has been of the same amount throughout the entire period of service rendered by such employee prior to the first day in the month of January of the first year after the year in which this Act shall come in force and effect in such city, that such salary shall be on said day."

Prior to its amendment, section 14 fixed the assumed salary standard as being the salary received by the re-

spective present employee on December 31, 1921, instead of January 1, 1922. Irrespective of which date may apply in any individual case, the fact remains that the Act specifies that "for all purposes of this Act," it shall be assumed that the annual salary of any present employee has been of the same amount *throughout his entire period* of service prior to January 1, 1922, as it was on the date designated in section 14.

Computed theoretical deductions are necessarily erroneous where based on any amount of salary received by a present employee different from the amount being paid to him on the date specified in section 14. This latter prescribed salary must be used *for the entire period* of prior service of each present employee respectively in computing the theoretical deductions referred to in the second paragraph of section 17 of the Act.

It is the evident purpose and intent of the Act that each policeman shall pay for his own annuity if he remain in the service sufficiently long so to do; and that, in view of the fact that the City is contributing for the prior service of a present employee on an *assumed salary* in excess of the actual salary of such present employee, deductions shall continue to be made from the salary of such present employee for the purpose of equalizing the cost of the annuity to the present employee with the cost of the annuity to the future entrant, since the City's contributions for the future entrant are based on *actual salary* throughout.

This pension system is founded upon an actuarial basis and the Act requires that annuities shall be paid for by both future entrants and, so far as possible, by present employees upon the same basis. Neither future entrants nor present employees are discriminated against in the Act as to their salary deductions, so long as either remains in

the service of the City as a policeman. Both must *pay* while in the service until the required accumulation, actual or theoretical, has been attained.

I am of the opinion that deductions shall continue to be made from the salary of each present employee until the amount so deducted, together with the amount deducted from his salary or otherwise paid by him according to law and applied to any Police Pension Fund, as designated in section 17, with interest on both such amounts at the rate of 4 per cent per annum shall be equal to the sum which would have accumulated to his credit for age and service annuity purposes from sums deducted from his salary if deductions from his salary for such purposes at $3\frac{1}{2}$ per cent had been made during the entire period of his service until his attainment of an age of fifty-seven (57) years plus interest upon such sum at the rate of 4 per cent for the time subsequent to his attainment of the age of fifty-seven (57) years.

I am of the further opinion that in ascertaining the amount of theoretical deduction referred to in the second paragraph of section 17 of the Act, interest at 4 per cent per annum should be added to each such contribution from the time such contribution is assumed to have been made.

I am of the further opinion that no present employee is entitled to any refund of salary deductions unless the total sum of his *actual* salary deductions, when added to the City's contributions, are found to constitute an accumulation in excess of the accumulation necessary to purchase his maximum allowable annuity *at the time such annuity is fixed*.

I am of the further opinion that deductions from the salary of a present employee shall cease to be made only when the total accumulation resulting from his *actual*

salary deductions, interest, other *actual* moneys paid into the fund and the City's contributions, is equal to the amount designated in section 17 of the Act.

(No. 6221—May 25, 1928—F. J. V.)

1 FIRE DEPARTMENT, ASSISTANT TO DIVISION FIRE MARSHAL, ETC., CIVIL SERVICE.

The appointment of an Assistant to the Division Fire Marshal in Charge of the Bureau of Fire Prevention must be based upon the recommendation of the Fire Commissioner to the City Council that such a position should be created or that an appropriation be made therefor.

Hon. A. W. Goodrich, Fire Commissioner:

You recently submitted to us the following communication from Chief John Toubey, Division Marshal in charge of fire prevention, in which he asks for the appointment of an assistant. You quote from his communication the following:

“It frequently happens that the duties required of the Fire Marshal in Charge of Fire Prevention require the services of an assistant. This is so when he is present in person, and more particularly so when absent from the office on duty, on furlough or on sick leave.

“Therefore, I respectfully request that I be permitted to select an officer from the uniformed service now attached to this Bureau to aid in the conduct of the business of the Bureau, particularly during my absence.”

You direct our attention to a recent amendment of the Fire Department Ordinance passed by the City Council

January 16, 1928, which creates the position of "Division Fire Marshal in Charge." You suggest "that Chief Touhey's request is consistent with the spirit of the afore-said amendment," and you ask the advice of the Law Department "as to whether or not (you) can legally comply with the request made by Chief Touhey."

Any warrant of authority for such appointment must be found in the ordinances of the Council. An examination of the general ordinance creating the Fire Department (Ettelson's Chicago Municipal Code of 1922, chap. 29), as amended by ordinance of May 21, 1924 (Journal of the Proceedings of the City Council, page 3075), and amended further January 16, 1928, as above stated, discloses no reference of any kind to such a position or place of employment as assistant to the new position created by the last amendment, nor does it disclose any appropriation for such a position or place of employment.

Since the City Council alone has power to create offices, positions and places of employment in the City service, it is clear, in the absence of any Council action creating the position of assistant here sought to be filled by appointment, such appointment cannot legally be made.

We note your stated belief that the appointment of such assistant is consistent with the spirit of the amendment you refer to. A careful examination of this amendment discloses no hint of an intention to create an *assistant* to the position of Division Fire Marshal in Charge of the Bureau of Fire Prevention, the latter position alone being expressly created by that amendment ordinance.

It is our opinion that to secure the appointment of such assistant as here suggested, recommendation therefor to the City Council should be made by the Fire Commissioner. Such position of assistant may be sufficiently authorized by an appropriation therefor. When thus cre-

ated by the City Council, the Civil Service Commission, as required by section 3 of the Civil Service Act, will classify the same and the appointment may legally be made as in that Act provided.

We think all the foregoing requirements must be complied with before an official assistant to the Division Fire Marshal in Charge of the Bureau of Fire Prevention may be appointed.

(No. 6222—May 25, 1928—F. J. V.)

1 DISABILITY BENEFITS, FIRE DEPARTMENT.

The Fire Commissioner, the Chief Fire Marshal, the Chief Fire Prevention Engineer and members of the Bureau of Fire Prevention, the Director of Fire Instruction and members of his Bureau, the members of Fire Control and Extinguishment, and generally, all employees connected with the Fire Department provided for in the Annual Appropriation Ordinance, whether in uniform rank or not, are entitled to disability benefits under sections 1199 and 1200 of the Municipal Code of 1922.

2 VACATION PRIVILEGES.

Vacation privileges should be accorded to all employees, whether skilled or unskilled.

Hon. A. W. Goodrich, Fire Commissioner:

In a communication of recent date you asked for "an opinion as to whether or not all employees of the Fire Department, i. e., members of the uniformed rank, clerical force, mechanics, etc., are entitled, by virtue of section 1154 of the City Code to the disability benefits and privileges outlined in section 1199 of the City Code."

Both the sections here referred to are part of the general ordinance creating and providing for the Fire Department. (Ettelson's Chicago Municipal Code of 1922, chap. 29.) Section 1199, which provides for disability benefit, is as follows:

“Any member of the fire department receiving any injury or becoming disabled while in the discharge of his duties, so as to prevent him from attending to his duties as such member of the fire department, shall for the space of twelve months, provided his disability shall last that time, or for such portion of twelve months as such disability shall continue, receive his usual salary.”

Section 1200 provides for establishing such disability and for excluding from such disability benefits, any fireman who is at the time receiving benefits from the Pension Fund.

It is obvious that “any member of the Fire Department” is entitled to the disability benefits provided for by these sections. To determine who are members of the Fire Department, we must look to section 1154 of the Fire Department Ordinance above referred to, as amended by ordinance of May 21, 1924. (Council Journal of the Proceedings, page 3075.) This section reads as follows:

“There is hereby established an executive department of the municipal government of the city which shall be known as the fire department. The said fire department shall include the bureau of fire control and extinguishment, the bureau of fire prevention and the bureau of fire instruction. The said fire department shall embrace the fire commissioner, chief fire marshal, chief fire prevention engineer, director of fire instruction, and such other employees as shall be provided for in the annual appropriation bill.”

By looking to the Annual Appropriation Ordinance we may find all those officers, position holders and employees

for whom appropriations are there made as members of the Fire Department. All these, whether in the uniform rank or in other service of the Fire Department are entitled to participate in the disability benefits provided for in sections 1199 and 1200, *supra*.

In your communication you refer to the opinion of the Corporation Counsel of date August 12, 1927, submitted to you on the disability status of fire alarm operators and others. We may state that this opinion applies alike to all other employees and members of the Fire Department in establishing their disability benefits under the sections cited.

Referring to the annual vacation privilege provided for in the Appropriation Ordinance of 1928 (Council Journal Proceedings, page 1685), we are of the opinion that such vacation privileges are to be accorded to all employees, whether in the skilled labor group or not, and on this question our opinion of August 12, 1927, affecting the fire alarm operators, has full application.

(No. 6223—May 28, 1928—J. P. S. and E. H. D.)

1 TRUSTEE'S CERTIFICATES, INTEREST, RIVER
STRAIGHTENING ORDINANCE.

Trustee's certificates under the River Straightening Ordinance of July 8, 1926, do not bear interest if the certificates were issued to a party who was both grantor and grantee, in which case the transaction is treated as a mere exchange and reallocation of properties involved and in which situation are the Fort Wayne, B. & O. Terminal, North Western & Burlington jointly, Western Indiana, New York Central, and Rock Island jointly and the Rock Island Railway and Railroad Companies, also the City of Chicago. Trustee's certificates issued under said ordinance bear interest at 6 percentum from delivery of possession of the properties covered by the certificates where the transaction is regarded as a sale, in which situation are the Chicago & North Western Railway and the Burlington & Quincy Railroad Companies as are William P. Kopf, Samuel C. Pirie, Trustee, St. Charles Air Line and the Sanitary District.

2 RIVER STRAIGHTENING ORDINANCE.

Section 17, article 5 of the River Straightening Ordinance of July 8, 1926, contemplates that Trustee's certificates shall bear interest only where the transaction is a sale and that such certificates should not bear interest where the transaction is a mere exchange or reallocation of the properties involved.

Foreman Trust & Savings Bank, Trustee:

You have requested an opinion of the Corporation Counsel as to whether certain of the certificates to be issued by the Foreman Trust & Savings Bank, trustee, under the River Straightening Ordinance of July 8, 1926, should bear interest.

In this connection you have called attention to the fact that the Chicago and North Western Railway Company

and the Chicago, Burlington and Quincy Railroad Company accepted the River Straightening Ordinance of July 8, 1926, on condition that they be paid in cash the full amount of the agreed purchase price of the properties to be conveyed by them to you as trustee. This makes it necessary to market the trustee's certificates to be issued by you to the North Western and Burlington, and you have advised us that certain Chicago banks propose to purchase said trustee's certificates, but before doing so, wish to be assured that the Northwestern and Burlington trustee's certificates will bear interest at the rate of 6 per cent per annum as provided in the ordinance.

Section 17 of the Ordinance of July 8, 1926, contains the following clause as to the payment of interest on trustee's certificates:

“Such certificate shall not bear interest except in the case where the grantor or grantors is or are not a grantee as shown in Schedule D, in which event said certificate shall bear interest at 6% per annum from the date that the possession of the parcel or parcels of property covered by said certificate is surrendered in accordance with a notice so to do by the commissioner.”

An examination of Schedules C and D, as revised by the determination of definite areas by the surveyors, shows the following situation as to grantors and grantees and the selling prices to be received and the purchase prices to be paid by them:

SCHEDULE C.

	Grantor	Selling Price
1	Fort Wayne	\$ 593,090
2	B. & O. Terminal	3,443,580
3	North Western & Burlington, jointly	101,836
4	Western Indiana	75,301
5	New York Central & Rock Island jointly	2,577
6	Rock Island	640,909
7	City of Chicago	83,636
8	North Western	2,351,621
9	Burlington	1,511,773
10	Wm. P. Kopf	140,929
11	Samuel C. Pirie Trustee	22,872
	St. Charles Air Line	1
13	Sanitary District	1

SCHEDULE D.

	Grantee	Purchase Price
	Fort Wayne	\$1,293,032
	B. & O. Terminal	5,476,261
	North Western & Burlington, jointly	112,584
	Western Indiana	206,154
	New York Central & Rock Island, jointly	2,759,956
	Rock Island	1,469,064
	City of Chicago	1,781,883

Each of the first seven parties named in the above tabulation is clearly a grantor and also a grantee and they therefore are not entitled to receive interest on the trustee's certificates to be issued to them. The last six parties named (numbers 8 to 13) are grantors but are not grantees, unless it can be said that the Northwestern and Burlington are grantees because of the fact that two parcels of property are to be conveyed to them jointly under Schedule D for a consideration of \$112,584.

In our opinion the reason for the non-payment of interest to the first seven parties in the tabulation is that the conveyance of property by them is not so much a sale as it is an exchange or reallocation of properties. Each of these seven parties will receive, as a result of the improvement, properties having greater value than the properties conveyed by them and they will be obliged to pay the resulting difference between the selling prices and the purchase prices. This situation, however, does not exist as to the last six parties. The North Western is required to convey property for a consideration of \$2,351,621

and the Burlington is required to convey property for a consideration of \$1,511,773. These railroads do not receive any property in return for these conveyances, but the entire consideration for the conveyance is a cash consideration.

We do not believe that the mere fact that the North Western and Burlington, jointly, are to convey properties for a consideration of \$101,836 and are to receive properties in their joint capacity for \$112,584, operates to make either of them alone, a grantee within the meaning of the interest clause of the ordinance.

The City of Chicago, acting by its City Council, has evidently placed this interpretation on the ordinance. The aggregate amount of the purchase prices to be paid to the last six parties named in the tabulation is \$4,027,198. Six per cent of this sum is \$241,631.88. In its annual appropriation for the fiscal year 1928, the City of Chicago made the following appropriation:

“For the purpose of paying interest
on trustee’s certificates as per require-
ments of section 17, article V and section
20, article V of the River Straightening
Ordinance passed July 8, 1926, as
amended \$567,806.00”

This appropriation is sufficient to pay the interest on the certificates to be issued to the last six parties named in the tabulation for a period of about two and one-third years, which we understand is the approximate period the trustee’s certificates will be outstanding. However, if the North Western and Burlington certificates were excluded and held to be non-interest bearing, the total of the interest bearing certificates would be only \$163,803 and the amount appropriated by the City of Chicago, \$567,806 would be sufficient to pay the interest on these certificates for more than fifty years.

The situation as to the railway use and occupation is also pertinent. The Chicago & North Western Railway Company (hereinafter referred to as the North Western) owns certain lands on the west side of the south branch of the Chicago River which, as grantor, it is selling to the trustee. This company is not a purchaser from the trustee and its name is not mentioned alone as a grantee. What has been said of the North Western is true of the Chicago, Burlington & Quincy Railroad Company, hereinafter referred to as the Burlington.

On the other hand, the North Western and Burlington, jointly, own a right-of-way to the St. Charles airline. This joint right-of-way the said two railways are, by the terms of the ordinance, jointly to convey to the trustee. The two roads are listed together as "joint" grantors in the ordinance and in "Schedule C." After conveying to the trustee said right-of-way only, and conveyed by them jointly, the trustee is to convey to these two roads jointly, another right-of-way to the said Airline. The two roads are enumerated "jointly" in the ordinance (section 18) and in "Schedule D" of grantees. Thus, it appears that this joint ownership pair of roads are both grantors and grantees,—in each case expressly granting and being granted jointly. On the other hand, the name of neither the North Western, nor the Burlington appears by itself in the list of grantees in section 18, or in "Schedule D."

After locating on the ground various properties owned and granted by the aforesaid two railways separately, the properties received by them separately, and also locating properties jointly conveyed and jointly received, it is apparent that the North Western alone is conveying for cash, certain lands in which the Burlington has no interest, and that the Burlington alone is conveying properties of which it is the sole owner and in which the North Western has

no interest. At the same time, these two railways are interested together as joint owners of the right-of-way which they now jointly use, and in place of which they are to receive in their joint capacity, a differently located right-of-way. In respect to these jointly owned properties, the purpose of the transaction is to give the two roads a relocated joint right-of-way.

We, therefore, are of the opinion that neither the Chicago and North Western Railway Company nor the Chicago, Burlington and Quincy Railroad Company, individually, is a grantee within the meaning of the interest clause contained in the River Straightening Ordinance of July 8, 1926, and we, therefore, are further of the opinion that the trustee's certificates to be issued to the North Western and Burlington should provide for the payment of interest at 6 per cent per annum.

(No. 6224—May 28, 1928—R. N. L.)

BUILDINGS, PERMIT.

A permit to build according to approved plans and specifications may be issued by the Commissioner of Buildings to a grantee or a lessee of a railroad company who has sold or leased a part of its real estate for non-railroad purposes.

Hon. Christian P. Paschen, Commissioner of Buildings:

Your letter of recent date addressed to the Honorable Samuel A. Ettelson, Corporation Counsel, relative to the air rights involved in the issuance of a permit to the Chicago Daily News Printing Company, for the erection of a newspaper plant and office building on the block bounded

by Madison street, Washington street, Canal street, and the South Branch of the Chicago River, has been referred to me for reply.

The power of railroad, union depot and terminal companies as to the sale or lease of real estate at, above or below the surface, appears in Railroads and Warehouses Act, chapter 114, paragraph 68, p. 2020, Cahill's Statutes, 1927, as follows:

“That whenever any railroad, union depot or terminal company is the owner, in fee, of real estate susceptible of other than railroad uses without abandonment of such railroad uses, or different levels or parts of different levels of which real estate may be devoted to such other uses without unreasonable impairment of the use of the remainder for railroad purposes, or the part of said real estate above or under the part thereof needed in such company's railroad operations (with reasonable use of the surface and sub-surface of said real estate for foundation and other incidental uses) may be utilized or developed for buildings or other structures to be used in other than railroad business, such railroad, union depot or terminal company may improve, utilize and develop the part of such real estate so susceptible of such other use or uses or the parts of which may be so separated for other uses, so as to obtain the benefit thereof and may subdivide the separate level or levels susceptible of such other uses into lots and blocks, construct elevated streets, walks and other appurtenances and facilities proper to such development; and may sell, convey and transfer to purchasers any separable part or parts (singly or combined) of such real estate, at, above or below the natural surface of the ground, susceptible of such other uses, or may lease to others such part or parts thereof as said company may at any time elect: *Provided*, that the plan of such development, improvement, utilization or other use (and any subsequent modification thereof), and the conveyance, transfer or lease proposed is in each instance first approved by the Illinois Commerce Commission and said commission finds that the use

of such part of said land or lands so susceptible of or separable for other uses will not unreasonably impair the use of the remainder of said real estate for railroad purposes."

The railroad having entered into a lease with the Chicago Daily News Printing Company, pursuant to the above stated Act, the Building Department should accept their application for a permit to build, on the same basis as other applications.

The question as to the plans and specifications conforming to the Building Code of the City of Chicago is a matter for your Department to pass on.

Therefore in our opinion you may issue a permit to the Chicago Daily News Printing Company as soon as said plans and specifications meet the approval of your Department.

(No. 6225—May 29, 1928—L. H.)

1 ADVERTISEMENT FOR BIDS, RIVER STRAIGHTENING.

The order of the Illinois Commerce Commission involving river straightening having become final by lapse of time, and all parties interested being about to exchange deeds and releases, there is no further reason for delaying the advertisement for bids and the letting of a contract beyond the day after the actual exchanges and releases have taken place.

2 ADVERTISEMENT FOR BIDS, DATE OF OPENING.

At least ten consecutive business days must intervene between the initial date of advertisement and the date fixed for opening the bids, but this period can be extended if necessary to give bidders a longer time within which to prepare their estimates.

Hon. Richard W. Wolfe, Commissioner of Public Works:

We are in receipt of your letter of the 28th instant in which you ask for advice as to when it will be lawful

and proper to advertise for bids for straightening of the south branch of the Chicago River, and as to the length of time after the first day of such advertising that the receipt of bids may be requested.

In our opinion of March 7, 1928, we stated that the reason for advising you against letting the contract at that time was because the Illinois Commerce Commission had not entered a final order disposing of the application of the railroad companies for permission to carry out their obligations under the terms of their agreements with the City relating to river straightening. Although an informal preliminary announcement had been made by the Illinois Commerce Commission, in contemplation of law the matter was still pending. There was in fact the possibility of final action which might reverse the premature announcement.

We are informed by you that since that time the Illinois Commerce Commission has entered its final order and that more than thirty days have elapsed since the serving of that order upon the several parties interested. You state further that attorneys representing the bankers, the City and the trustee under the ordinance, have been in conference and have set Friday, June 1st, at 10 o'clock as the day on which the deeds and releases of the several railroads will be delivered to the trustee and to the bankers.

Under these circumstances we see no reason why the letting of the contract should be delayed. It will be entirely proper for you to proceed at once to secure bids. As already explained to you the River Straightening Ordinance prescribes no special method for letting the contract, and therefore the general ordinances of the City with which you are entirely familiar will govern the letting of this contract.

Under section 3260 of the Chicago Municipal Code of 1922 you are required to advertise for bids for at least ten consecutive business days. Aside from that requirement, you are not limited with respect to the time when the bids should be opened. It is entirely within your discretion to fix a date at such time as you believe will give the bidders sufficient time to prepare their estimates. Hence, in this respect, as well as in all other respects, the contract may be let in accordance with the provisions contained in article XI of chapter LXV of the Chicago Municipal Code of 1922. In view of the fact that the deeds are to be passed on June 1st, we recommend that you wait until June 2d before advertising.

(No. 6226—May 29, 1928—M. H. F.)

NATIONAL GUARDSMEN, CUSTODY BEFORE TRIAL.

Previous to conviction and sentence, members of the National Guard awaiting trial by court martial may be confined by the police only in co-operation with and as agents of the military authorities who alone assume responsibility for the imprisonment.

Hon. John H. Alcock, Acting Commissioner of Police:

In your communication of recent date you ask to be informed whether there is any civil law prohibiting the detention at local police stations of delinquent National Guardsmen, pending the time they are called for by a representative of the National Guard. From the writer's personal conference with officials of your Department, it is assumed that your inquiry may be narrowed to the

above question as applied to the enlisted members of the National Guard of Illinois, and to the determination of the question whether we see any legal objection to the temporary, or short time, confinement by the Chicago Police Department of enlisted men who have been placed in arrest by the military authorities and ordered confined while awaiting trial by courts-martial or other disposition by the military authorities.

The National Defense Act (Act of June 3, 1916, as amended) provides that the discipline of the National Board shall conform to the system prescribed for the Regular Army; and that Act further provides for the National Guard a system of courts-martial similar to that established for the Regular Army. These courts are constituted alike, and have cognizance of the same subjects and possess like powers, except as to punishments, as similar courts provided for by the laws and regulations governing the Army of the United States, and the proceedings of National Guard courts-martial follow the forms and modes of procedure prescribed for said similar courts.

By section 108 of the National Defense Act it is provided:

“In the National Guard, not in the service of the United States, presidents of courts-martial and summary court officers shall have power to issue warrants to arrest accused persons and to bring them before the court for trial whenever such persons shall have disobeyed an order in writing from the convening authority to appear before such court, a copy of the charge or charges having been delivered to the accused with such order, * * *.

“All processes and sentences of said courts shall be executed by such civil officers as may be prescribed by the laws of the several States and Territories, and in any State where no provision shall have been made for such action, and in the Territories and the District of Columbia, such processes and sentences shall

be executed by a United States marshal or his duly appointed deputy, and it shall be the duty of any United States marshal to execute all such processes and sentences and make return thereof to the officer issuing or imposing the same."

The procedure prescribed in the Manual for Courts-Martial applies to the National Guard when in State service. Sec. 102, National Defense Act, *supra*; Ops. J. A. G. 300.7, May 5, 1922, Dig. of Ops. J. A. G., January-December, 1922, page 23.

In the Manual for Courts-Martial, U. S. Army, 1928, under the chapter entitled "Procedure Before Trial," section 19, it is provided:

"Any person subject to military law charged with crime or with a serious offense under the Articles of War shall be placed in confinement or in arrest as circumstances may require; but when charged with a minor offense only, such person shall not ordinarily be placed in confinement. (A. W. 69.) This requirement is not mandatory. Arrest or confinement may, in the interest of the Government, be deferred until arraignment, and failure to arrest or confine does not affect the jurisdiction of the court.

"No person will be placed in arrest or confinement under the authority of A. W. 69 except on personal knowledge of, or after inquiry into, his offense. The character and duration of the restraint imposed before and during trial, and pending final action upon the case, will be the minimum necessary under the circumstances."

Members of the National Guard when in State service, rather than Federal service, are not, however, subject to the Articles of War. A. W. 2, sec. 1, chapter II, Act of June 4, 1920, 41 Stat. 787.

The regulations issued by the authority of the President, governing the National Guard of the several States contain the following (N. G. R. No. 37, sec. 13):

“Arrest before trial.—a. *At armory station.*—When an organization is at its armory station, the period of arrest before the trial should ordinarily cover only the time an officer or enlisted man should be present with his organization. It should not extend outside of his military status and duties. An unauthorized absence would thus include a breach of arrest.

“b. *At camp.*—When an organization is in camp or otherwise away from its station and armory for training or service, the ordinary procedure pertaining to the Regular Army should be followed.”

National Guard Regulations No. 37 also re-enact and amplify the provisions of section 108 of the National Defense Act, *supra*, but no provision is found in these regulations which specifically authorizes the confinement of members of the National Guard not in the service of the United States before conviction by courts-martial. In fact the present policy of the War Department seems to be opposed to the practice of confining National Guardsmen in State service before conviction and to restricting the technical military arrest to the period of their actual military status and duties.

The Military and Naval Code of Illinois, chapter 129, Smith's Statutes, 1927, also covers the subject of military offenses and courts-martial; and in section 184, provides that all proceedings by courts-martial shall be conducted in the same manner and by the same rules and methods of procedure, as nearly as may be, as are prescribed for courts-martial in the United States Army. This Code also provides that the collection of fines imposed by sentence of a court-martial may be satisfied, in default of payment, by commitment and confinement in the common jail of the county; it provides for the issuance of warrants of commitment, after approval of sentences of courts-martial, directed to the Sheriff of the county wherein the de-

fendant resides, who shall forthwith take the body of such defendant conveying him to the county jail or State penitentiary mentioned in the warrants; and by section 190 of said chapter it is further provided as follows:

“It shall be the duty of the keepers and wardens of all county jails to receive and confine all military offenders, when delivered by such sheriff or constable, under such warrant or commitment, for and during the term of sentence set forth in such commitment, or for an equal number of days as there are dollars in any fine so defaulted in payment.”

There is, however, no express provision embodied in this chapter authorizing the civil authorities to confine offenders while awaiting trial or before sentence and commitment.

When a Guard organization is ordered to camp for instruction and training, the individuals composing it are bound by their contract of enlistment and their oath of allegiance to obey the mobilization orders of higher military authorities and from such mobilization date such individuals may be said to be on a military duty status within the provisions of section 13 of the National Guard Regulations above referred to. It would be most inconsistent with our ideas of military law and procedure if these individuals could with impunity disregard the orders of their officers, and if such officers were to lack the power and authority to compel obedience to their lawful orders.

However, in view of the apparent policy of the War Department not to confine National Guard offenders before sentence and conviction, it appears to us that your question is one which is not likely to arise, though should it arise, we see no legal objection to the Chicago Police Department co-operating with another agency of the State and permitting the National Guard authorities to utilize temporarily the City's place of confinement. The ques-

tion of right to confine would be one which the military authorities would be required to determine and assume responsibility for, and any individuals thus confined, would of course, be the prisoners of the military authorities, and not the civil authorities.

A similar question to the one here presented was before this Department and may be found answered in the opinion dated June 24, 1916, addressed to the then General Superintendent of Police and printed in Opinions of the Corporation Counsel from May 1, 1915, to June 30, 1916, on page 1050. It dealt with enlisted men charged with desertion and was predicated upon the fact that the National Guard organizations allocated to Chicago had no suitable place where the accused might be incarcerated while awaiting trial. It was decided that the prisoner thus placed in the custody of the police was, in contemplation of law, the prisoner of the military authorities, and not the civil authorities, and that the former were responsible for his detention, and that no liability could attach to the civil officer who, in response to an order of the proper military authorities, keeps the prisoner safely until such time as he is tried by court-martial, or is otherwise duly discharged by process of law. It was, however, pointed out in this opinion that the police officer who detains a person thus arrested should have authority in writing from the military officer who orders the detention, inasmuch as the police officer, under such circumstances, acts as the agent of the military authorities, and furthermore, that it would be advisable to send all such prisoners to the county jail as soon as practicable after arrest, inasmuch as the State statute expressly recognizes the county jail as a proper place of confinement after trial and issuance of warrant of commitment.

(No. 6227—June 1, 1928—F. J. V.)

1 CIVIL SERVICE, ELIGIBLE LIST, RESTORATION OF CANCELLED LIST IS NOT PERMITTED.

An eligible list which has been stricken from the record because it has remained upon the register for more than two years cannot be restored and the eligibles therein thereby reinstated.

2 CIVIL SERVICE EXAMINATION, FREQUENCY.

The Civil Service Commission exercises a sound discretion as to the frequency with which examinations may be held.

3 CIVIL SERVICE RULES, NATURE.

All of the administrative acts to be performed by the Civil Service Commission must be done according to rules first made and adopted, which rules have the same force and effect as ordinances or statutes.

Hon. William Hale Thompson, Mayor:

Complying with your request of this date we hereby submit our written opinion upon the question whether or not a list of civil service eligibles, which has been officially stricken from the register by the Civil Service Commission after such list has remained on such register "for two years and one day," can be lawfully restored and its eligibles thereby reinstated.

We think the Civil Service Commission is wholly without power to restore or revive such cancelled list of civil service eligibles. Upon such official cancellation such eligible list becomes *functus officio*. (Bouv. Law Dict., Rawle's 3d Ed., 1323.) This means that such list of eligibles on the official civil service register has fulfilled its function and served its purpose, and therefore is of no further force or authority. 27 Corpus Juris, p. 926 and

cases; *Savage v. Merle* (Mass.), 5 Pick. 85; *Banking Co. v. Taliafero* (Tex.), 262 S. W. 196. A clear example is the case where there has been no levy under an execution and the return day has expired; the writ is *functus officio* and confers no authority whatever, and any attempted levy and sale by virtue of it are nullities. *Faull v. Cooke* (Oreg.), 26 Pac. 662 (664), 20 Am. St. Rep. 836. So the names on said eligible list, not having been certified, and such list having expired by cancellation, is *functus officio*, and further certification therefrom would be void.

There can be no authority to restore such cancelled list of eligibles unless the same is expressly or by necessary implication conferred by the Civil Service Act and the rules of the Civil Service Commission made pursuant to section 4 of said Act. Said section is as follows:

“Said commission shall make rules to carry out the purposes of this act, and for examinations, appointments and removals in accordance with its provisions, and the commission may, from time to time, make changes in the original rules.”

Section 5 provides for “publication of rules and time of taking effect.” Section 6 applies to “examinations.” Section 7 makes provision for “notice of examinations.”

Section 8 of the Act provides for registers of eligible list as follows:

“From the returns or reports of the examiners or from the examinations made by the commission, the commission shall prepare a register for each grade or class of positions in the classified service of such city of the persons whose general average standing upon examination for such grade or class is not less than the minimum fixed by the rules of such commission, and who are otherwise eligible; and such persons shall take rank upon the register as candidates in the order of their relative excellence as determined by examination, without reference to priority of time of examination.”

There is no provision in the Civil Service Act itself relating to the frequency with which examinations may be held, nor as to the period of time the lists established by such examinations shall continue. This we think was intended to be left to the discretion of the officers charged with the administration of the law (*People v. Errant*, 229 Ill. 57, 61), to be expressed in and governed by existing rules to be established pursuant to said section 4 of the Civil Service Act.

Section 6 of Rule III of the Civil Service Commission, in force and effect November 15, 1925, reads as follows:

“Names remaining on eligible registers for two years and one day shall continue to remain on such eligible registers, unless the same shall have been stricken therefrom by the Commission.”

Rule XI, on the subject of Administration, by section 5 provides for “Regulations” as follows:

“The Commission may from time to time adopt regulations of procedure for the administration of these rules, the government of its office, and the guidance of its examiners and employes in the performance of duties assigned to them.”

Regulation VII is a repetition of section 6 of Rule III. Subdivision (d) of section 1 of Regulation VIII, having to do with the civil service “record system,” prescribes the following:

“After a list has been cancelled the index history cards of eligibles who failed to receive an appointment shall be filed alphabetically with the cards of those who failed to qualify by examination. Uncertified cards in the working list made from book registers shall be destroyed. Certified cards in the same list shall constitute a working list.”

It is quite obvious from the foregoing rules and regulations that when the Civil Service Commission exercises

its power by officially striking from the register of civil service eligibles those whose names have remained thereon for "two years and one day," the eligibility of such persons ceases, their "*index history cards*" must be "*filed with the cards of those who failed to qualify by examination,*" and all "*uncertified cards in the working list made from book registers shall (must) be destroyed.*"

No more specific provision could be made for the absolute legal and final termination of such list of civil service eligibles and the eligibility of those named in the list. This power once regularly exercised by the Civil Service Commission, is beyond recall by the Commission. In such case the legal past must bury its dead and the Commission act anew to create another eligible list in the way prescribed by the Civil Service Act and existing rules. This is made mandatory upon the Commission by the old legal maxim that where the law prescribes the way to do a thing, that is the way to the exclusion of all others, in which such thing may be done. The Supreme Court invariably has overruled any attempted administration of the Civil Service Law which was not strictly in accordance with the provisions of the Civil Service Act. *People ex rel. v. Kipley*, 171 Ill. 44; *City of Chicago v. Luthardt*, 191 Ill. 516; *People v. Errant*, 229 Ill. 56; *People ex rel. v. City of Chicago*, 283 Ill. 462.

The Civil Service Commission is the principal administrator of the Civil Service Act. Its government is one by law—the Civil Service Act and the rules adopted pursuant to that Act. These rules have the same force and effect as the Act itself, just as City ordinances have the same character, force and effect as statutes when authorized by the Cities and Villages Act. Furthermore, without such rules the Civil Service Commission cannot administer the Act, for the Legislature has prescribed in

mandatory language that "*said commission shall make rules to carry out the purposes of this Act.*" There can be, therefore, no varying exercise of discretion in the administration of the civil service, but all administrative acts must be done according to rules first made and existing "*to carry out the purposes of this Act.*" In a case analogous to this it was said in an opinion of the Corporation Counsel that

"These rules, which the commission by section 4 of the Civil Service Act, is directed to make, have the force and effect of the provisions of the act itself, and the failure to apply them in this case would, in our opinion, involve the integrity of the commission in the legal enforcement of sections 8, 9, and 10 of the Civil Service Act, having to do with registers of persons eligible to civil service positions and their rights by promotional examination to attain higher positions in the service." Opinions of Corporation Counsel, 1925-1926, pp. 168, 170.

The Civil Service Commission is powerless to restore the cancelled list of eligibles, first, because such list has become *functus officio*; second, because the Commission is not a judicial body and has no grant of power to do so. Not even a court of general jurisdiction in the judiciary can review, reverse, or modify a final judgment after the term at which it was rendered. (15 C. J., p. 825; *Voss v. Prentiss*, 154 Ill. App. 609.) What is said by the court in this case of a judgment entered on April 4, 1908, after a final judgment had been entered in February, is pertinent here (p. 615):

"The court was without jurisdiction to enter this later order and judgment, consequently it is a nullity, and the mere fact that none of the parties are complaining does not operate to restore the jurisdiction after it was lost. Neither motion nor order was made to vacate the first judgment, so that after the lapse of the February term, 1908, of the Superior Court, that court had lost all power to enter any other order

or disturb the record of its judgment solemnly pronounced.”

So, the Civil Service Commission which is an arm of the executive branch of the Government and possesses no judicial power, cannot revoke its final order and record of the cancellation of a civil service eligible list.

(No. 6228—June 2, 1928—J. W. B.)

1 OATH OF OFFICE, ADMINISTERING.

The Commissioner of Police under section 3066 of the Municipal Code of 1922 may administer the oath of office to a police surgeon.

2 WORDS AND PHRASES.

The term “policeman” under section 3066 of the Municipal Code of 1922 includes police surgeons.

Hon. Michael Hughes, Commissioner of Police:

Replying to your communication requesting us to advise you as to your right to administer the oath taken by police officers to police surgeons employed in the Police Department, we desire to advise you that section 3066 of the Chicago Municipal Code, as amended, reads as follows:

“The following members of the department of police, viz.: the *commissioner* of police, *first deputy commissioner of police*, the *deputy commissioners* of police, the chief identification inspector, the chief surgeon, the assistant identification inspectors, the custodian of lost and stolen property, the secretary of the department, the secretary to the *commissioner* of police, the head clerk of the detective division, the

drill-master, the chief operator, the poundmaster, the two foremen of stables, and all captains, lieutenants, police surgeons, patrol sergeants, desk sergeants, detective sergeants, patrolmen, patrolwomen, police matrons, dog catchers, kennelmen, hostlers and operators, shall be known and are hereby designated as 'policemen,' and shall constitute the police force of the City of Chicago."

From a reading of the above section you will observe that the City Council has expressly provided that police surgeons shall be known and designated as policemen, and, with the Commissioner of Police, First Deputy Commissioner of Police, Deputy Commissioners of Police, Patrolmen, etc., shall constitute the police force of the City of Chicago.

The City Council had the power to designate what members of the Police Department shall be policemen. The City Council, having exercised its right and designated, among others, police surgeons as policemen, the police surgeons are entitled to take the oath that you administer to patrolmen, operators, kennelmen and hostlers.

(No. 6229—June 2, 1928—L. H.)

- 1 WATER FUND, RELOCATION OF WATER TUNNEL ON ACCOUNT OF CONSTRUCTION OF INTERCEPTING SEWER, CITY NOT LIABLE FOR COST.

The cost of making changes in the grade of the Blue Island avenue water tunnel made necessary by the construction of an intercepting sewer along 22d street bending southwest into Blue Island avenue must be borne by the Sanitary District of Chicago and not by the City from its Water Fund.

- 2 PUBLIC UTILITIES, CHANGE OF GRADE IN STREETS, EXPENSE OF.

The rule that the expense of changing grade in streets to accommodate a superior public use must be borne by the public utilities occupying such streets does not apply to the City of Chicago with reference to the operation of its water system because such a system was primarily intended for governmental purposes and the sale of water is only incidental.

- 3 STREETS, CITY HAS PRIMARY RIGHT TO THEIR USE.

The City has a prior right to the use and control of its streets, regardless of whether or not it owns the fee in them.

Hon. Richard W. Wolfe, Commissioner of Public Works:

In your letter of recent date concerning the relocation of the Blue Island Avenue Water Tunnel at Ashland avenue and 22d street, you ask for an opinion as to the liability of the Water Fund of the City of Chicago for the cost of making changes in the grade of the tunnel to permit of the crossing of the proposed intercepting sewer about to be constructed by the Sanitary District of Chicago.

It appears that the Blue Island Avenue Water Tunnel was constructed in 1908, passing southwest on Blue Island avenue and turning south into Ashland avenue at 22d

street. The tunnel lies within street lines and does not abut on private property. It is now proposed by the Sanitary District of Chicago to run an intercepting sewer along 22d street bending to the southwest into Blue Island avenue at Ashland avenue. As designed, the sewer will pass through the space now occupied by the water tunnel, and you state that it will be more practicable to change the grade of the water tunnel than to deflect the grade of the proposed sewer.

This situation has resulted in the Sanitary District setting up the claim that the City is bound to assume the expense in connection with the changing of the grade of the water tunnel, and that the same should be paid out of the Water Fund. This, you state, does not appear to you to be a reasonable demand, and you therefore ask for the opinion.

The rights in the streets are vested primarily in the City. The City holds the streets as trustee for the benefit of the public. In fact, in the case of a statutory dedication of a street, the fee is vested in the City. It is not necessary for the purposes of this opinion to go into the question of whether the City owns the fee in the streets involved, because whether it does or not it has the prior right to use and control them for public purposes.

This being so, we can conceive of only one theory under which the claim of the Sanitary District can be set up. That is the theory that because the City operates its water system as a public utility which charges private consumers for service it is bound to make alterations in its utilities to conform to other public requirements at its own expense. The writer informally inquired of the Law Department of the Sanitary District whether this was its theory, but has received no reply. ,

So far as public utility corporations which obtain their grants from the City are concerned, we have repeatedly held that they must conform to changes of grade in streets and make alterations necessary to accommodate superior public uses at their own expense. (See **Opinions of Corporation Counsel** from May 1, 1915, to June 30, 1916, p. 757; **Opinions of 1923-1924**, p. 864; **Opinions of 1925-1926**, p. 162, etc.) This rule, however, does not apply to a public utility owned or operated by the City, because the reasons underlying the rule, as will be seen from the opinions referred to, do not apply to the municipality. This is especially true with respect to the City's water system, which is operated only partly on the basis of a revenue producing utility. Not only is the water used in a large measure for governmental, as distinguished from private, purposes, but it can even be shown that at its inception the water system was primarily intended for such governmental purposes and that the sale of water was incidental.

We are therefore of the opinion that the position taken by the Sanitary District on this question, if based on what is stated herein, is unsound, and that the City's water fund is not liable for the expense of altering the grade of the water tunnel.

(No. 6230—June 4, 1928—E. J. S.)

1 LAKE CALUMET HARBOR TAX RATE, NOT SCALABLE.

The Lake Calumet Harbor tax rate must be extended in full against all taxable property of the City, as the same is expressly exempted from the scaling process; which tax is in addition to the taxes for general purposes but all the taxes together must not exceed the City tax rate of \$1.12½.

2 HARBOR FUND, USE OF.

This fund can only be used for harbor development and construction of the Lake Calumet Harbor.

3 HARBOR ACT.

Section 3b of the Harbor Act expressly exempts from the Juul Law the Lake Calumet Harbor tax.

4 JUUL LAW.

This law is inapplicable to the Lake Calumet Harbor tax of 1927.

Hon. Charles C. Fitzmorris, City Comptroller:

This letter is written in response to yours of May 22, 1928, pertaining to tax levy for the purpose of the Lake Calumet Harbor Fund, contained in Tax Levy Ordinance passed by the City Council in January of this year.

The Illinois General Assembly, at the 1927 regular session, passed an act known as Senate Bill No. 611, approved July 8, 1927, which, *inter alia*, adds a section known as section 3-b to the Harbor Act of July 1, 1913. It is under this new section of the Act that the Lake Calumet Harbor tax levy, amounting to \$1,200,000, as referred to in the Tax Levy Ordinance aforesaid, was made. Said section reads as follows, to wit:

“In addition to all other taxes authorized by law, such city or village is hereby authorized and empowered to levy and collect in each of four (4) consecu-

tive years a tax of one-fourth ($\frac{1}{4}$) of one (1) mill on each dollar of taxable property situated in such city or village, according to the valuation of the same as made for the purposes of the State and county taxation by the general assessment last preceding the time when such additional tax shall be levied; and the proceeds of such additional tax shall be credited to such harbor fund for such particular harbor development, and shall be used for harbor construction purposes only; *Provided*, that the county clerk in extending said additional tax upon the taxable property within such city or village shall not in any event reduce the same, and that said additional tax shall not be included in the one per cent limitation nor subject to the provisions of an Act entitled, 'An Act concerning the levy and extension of taxes,' approved May 9, 1901, in force July 1, 1901, as subsequently amended."

The questions which this opinion will attempt to answer arise from a consideration of the above quoted section and section 1 of article VIII of an Act entitled "An Act to provide for the incorporation of cities and villages," approved April 10, 1872, in force July 1, 1872, as subsequently amended, and section 2 of an act entitled "An Act concerning the levy and extension of taxes," approved May 9, 1901, as subsequently amended (Juul Law). Both of these last mentioned sections were amended at the same session of the Legislature as passed the section of the Harbor Act above quoted, and said section 2 of the Juul Law was recommended at the first special session of the General Assembly, held in the year 1928, although the amendment made at that special session does not affect the questions here being considered. Said section 1 of article VIII of the Cities and Villages Act reads, in part, as follows:

"The city council * * * may levy and collect taxes for corporate purposes in the manner following: The city council * * * shall * * * ascertain the total amount of appropriations for all corporate

purposes legally made and to be collected from the tax levy of that fiscal year; and, by an ordinance * * * shall levy the amount so ascertained * * *. A certified copy of such ordinance shall be filed with the county clerk * * * whose duty it shall be to ascertain the rate per cent which * * * will produce a net amount of not less than the amount so directed to be levied, and it shall be the duty of the county clerk to extend such tax * * * provided, *the aggregate amount of taxes so levied for any one year, exclusive of the amount levied for the payment of bonded indebtedness or interest thereon, and exclusive of taxes levied for the purposes of pension funds, public library and municipal tuberculosis sanitarium, for a period of three years beginning with the year 1927 shall not exceed the rate of one and twelve and one-half hundredths (1.12½) per centum* * * * in cities and villages of 150,000 or more population * * * upon the aggregate valuation of all property within such city or village subject to taxation therein. * * *"

Said section 2 of the Juul Law, directs the county clerk to ascertain the rate required to produce the amount certified for extension by the taxing authorities and directs him to reduce the respective rates proportionately, in case the aggregate tax rate exceeds one (1) per cent of the assessed valuation in any part of any taxing district or municipality, and further provides in a proviso, as follows:

"Provided, further, that in reducing tax levies hereunder, the rate per cent of the tax levy for * * * city or village purposes (exclusive of library, public tuberculosis sanitarium, pension fund, school and park purposes, and exclusive of the taxes levied for the payment of the principal of and interest on, bonded indebtedness) in cities and villages having a population of over 150,000, shall not be reduced below a rate of one dollar and twelve and one-half cents (\$1.12½) on each one hundred dollars assessed value. * * *"

The following questions present themselves:

I. Is the Lake Calumet Harbor tax subject to reduction under the Juul Law?

II. Is the Lake Calumet Harbor tax in addition to, or is it included in the aggregate City tax rate of \$1.12½?

III. Can the proceeds of the collection of the Lake Calumet Harbor tax be used for any purpose other than the construction of a harbor in Lake Calumet?

These questions we will consider in the order of their statement.

First—*Is the Lake Calumet Harbor tax subject to reduction under the Juul Law?*

In the case of *People v. Wabash Ry. Co.*, 321 Ill. 39, the Supreme Court had under consideration a tax levied by the Decatur Sanitary District, which was created under an act of the Legislature containing a provision similar to that contained in the Harbor Act above quoted, and the Supreme Court gave effect to the legislative intent and held that the tax was not to be scaled under the Juul Law. The court said, at page 44:

“Section 12 of the act under which the Decatur Sanitary District was organized provides that the annual tax and the taxes levied for the payment of the principal and interest upon the bonded indebtedness of the district shall not be included in the aggregate of all the taxes required to be reduced under the provisions of the act of May 9, 1901, concerning the levy and extension of taxes, as amended. Such a provision in the act by virtue of which a sanitary district is created exempts the taxes from the scaling process.”

Also, in *People v. N. Y., C. & St. L. R. R. Co.*, 316 Ill. 452, a proviso in the Act creating a sanitary district to the effect that the taxes therein provided to be levied should not be included in the aggregate of all the taxes

required to be reduced under the provisions of the Juul Law, was held to modify the Juul Law *pro tanto*.

In *People v. C., C., C. & St. L. Ry. Co.*, 295 Ill. 214, a tax levied by the county board under the Mothers' Pension Act, was attacked. Section 16 of the Mothers' Pension Act provided that the county clerk in reducing tax levies under the provisions of section 2 of the Juul Law, should not consider the tax for the mothers' pension fund as a part of the general tax levy for county purposes, and should not include the same in the limitation of two per cent of the assessed valuation upon which taxes were required to be extended. While the court held that the mothers' pension fund tax is a county tax, it further held that it was not subject to the scaling process under the Juul Law.

In *People v. C., B. & Q. R. R. Co.*, 295 Ill. 191, the county tuberculosis sanitarium tax was also held to be a county tax, but was not to be considered in the scaling process under the Juul Law, the act under which it was levied expressly providing that the county clerk in reducing tax levies under the Juul Law, should not consider the said tax as a part of the general tax levy for county purposes, and should not include the same in the limitation of two per cent of the assessed valuation upon which taxes were required to be extended.

Under these decisions, it seems clear that the Legislature, by the language contained in the proviso of section 3-b of the Harbor Act, hereinbefore quoted, has removed the harbor tax rate from the scaling process of the Juul Law and that it is the duty of the county clerk to extend said tax in full against all of the taxable property in the City of Chicago.

Second—Is the Lake Calumet Harbor tax in addition to, or is it included in the aggregate City tax rate of \$1.12½?

Said section 3-b of the Harbor Act provides that the harbor tax therein authorized is “in addition to all other taxes authorized by law.” It also speaks of said tax as “said additional tax.” In determining whether this tax is in addition to the aggregate corporate tax of \$1.12½ referred to in the Cities and Villages Act, *supra*, it is necessary to consider the language used in the light of cases hereinafter cited.

The Supreme Court, in *People v. Public Service Co.*, 328 Ill. 440, said:

“There is no inherent power in municipal corporations created by authority of the State to levy taxes.
* * * The rule accepted by all authorities is that the language of an act granting the authority to tax shall be strictly construed.”

People v. C., C., C. & St. L. Ry. Co., 295 Ill. 214, pertains to a tax levy under the Mothers' Pension Act of June 30, 1919, which provided that the tax for such purpose should be in addition to all other taxes which counties might be authorized to levy, and that the county clerk, should not consider such tax for scaling purposes under the Juul Law. The court said, at page 218:

“Section 16 of the Mothers' Pension act, as amended, does not in any way authorize the county authorities to assess the tax under that act in addition to the fifty cent rate allowed for all county taxes. The tax is to be levied ‘in addition to all other taxes’ which counties are now authorized to levy. The county authorities are only authorized to levy fifty cents for all county purposes, including the mothers' pension tax and tax for tuberculosis sanitariums, both of which latter taxes are clearly county taxes. The words, ‘all other taxes which such county is now’ authorized to levy, as used in section 16 of the Moth-

ers' Pension act, mean all other taxes levied for county purposes, including taxes levied for tuberculosis sanitariums and excluding taxes for the mothers' pension fund. These same quoted words are also used in a similar amendment to the Tuberculosis Sanitarium act, and in that amendment those words mean all other county taxes, including taxes for mothers' pensions and excluding tuberculosis sanitarium taxes. (*People v. Chicago, Burlington and Quincy Railroad Co.*, ante, p. 191.) It is quite clear when the Mothers' Pension act and the Tuberculosis Sanitarium act are both considered, that there is no intent expressed by the legislature in either act to permit the levying of those taxes in addition to the fifty cent rate allowed as a maximum tax rate for all county purposes when no referendum vote of the people is had. To so hold would be equivalent to holding outright that the tax for the mothers' pension fund and the tax for the tuberculosis sanitarium are not county taxes, contrary to all our holdings heretofore and contrary to the facts.

"In accordance with our holding with reference to the tax for tuberculosis sanitariums (*People v. Chicago, Burlington and Quincy Railroad Co.*, supra), and for the same reasons, we hold that the tax for the mothers' pension fund must be levied within the fifty cent limitation for county purposes and not in addition to it. The mothers' pension fund is a county tax and is to be so considered at all times, except in the scaling process under the Juul Law. It is not subject to the scaling process but it is to be included in full within the fifty cent limit, and that is the meaning of section 16 as amended."

The Tuberculosis Sanitarium Act, which was involved in the case of *People v. C., B. & Q. R. R. Co.*, 295 Ill. 191, cited in the foregoing case, provided that the tax therein authorized should be in addition to all other taxes which the county might be authorized to levy, and the court in that case likewise arrived at the conclusion that the said tax must be included within the corporate rate, because it is unquestionably a tax for county purposes, and it

is only to be considered otherwise in the scaling process under the Juul Law.

In *People v. N. Y., C. & St. L. R. R. Co.*, 316 Ill. 452, the city council of East St. Louis levied taxes for general corporate purposes and additional taxes for specific purposes, including a tax for streets and bridges, another for police pension fund and another for public benefits. The county clerk extended the city's taxes at the rate of \$1.96, including \$1.33 1-3 for general purposes, and the balance for the above and other specific purposes. The Supreme Court said:

"When the tax levy ordinance here involved was passed, the taxes for the three purposes specified were included within the statutory limitation for general purposes and the excess above that rate was void."

The court also held that the unauthorized excess could not be validated by a curative act of the Legislature.

In *People v. L. & N. R. R. Co.*, 307 Ill. 173, the City of East St. Louis levied taxes for general purposes, requiring the rate of \$1.33 1-3, and in addition thereto, other rates for street and bridge tax, pension fund and public benefits. The street and bridge tax was levied under an act providing that it should be "in addition to any tax any such city, village or incorporated town is now authorized to levy for street or bridge purposes and shall be in addition to the tax that such city, village or incorporated town is now authorized to levy upon the aggregate valuation of all property within such city, village or incorporated town. * * *" The court then refers to the cases above cited, *People v. Wabash Railway Company*; *People v. C., C., C. & St. L. Ry. Co.*; *People v. C., B. & Q. Ry. Co.*, saying that the language of this Act means only that the taxes should be in addition to other taxes authorized to be levied, but not that they should be in excess of the statutory limitation,

People v. Wabash Ry. Co., 286 Ill. 15, is to the same effect.

In *People v. C., C., C. & St. L. Ry. Co.*, 327 Ill. 611, the court said:

“This question has received the consideration of this court heretofore, and it has been held that authority to levy an additional tax is not authority to levy a tax above the limitation fixed by the constitution.”

The Harbor tax, therefore, must be extended and collected in full, but this harbor tax together with the tax for general corporate purposes, must not exceed a rate of \$1.12½.

Third—*Can the proceeds of the collection of the Lake Calumet Harbor tax be used for any purpose other than the construction of a harbor in Lake Calumet?*

Said section 3-b of the Harbor Act above quoted, clearly provides that the proceeds of said tax shall be credited to such harbor fund for such particular harbor development and shall be used for harbor construction purposes only. The language is so clear as to need no explanation or citation of authority. The courts would prevent the diversion of this fund to any purpose except the purpose of harbor construction. For instance, in the case of *Board of Water Commissioners v. Hall*, 98 Ill. 371, a Board of Water Commissioners, acting under an act of the Legislature, accumulated water rents in its hands. The Act in question provided that all funds derived from water rents should be exclusively used for and appropriated by said board to the objects and purposes specified in said Act. The Supreme Court held that these rents could not be used in extending the system of works and in establishing new structures, with the view of improving the quality of the water, but could only be used for the specific purposes set forth in the Act.

We therefore conclude that the harbor tax cannot be reduced under the provisions of the Juul Law, but that same must be collected in full, but this tax and the general corporate tax must not exceed \$1.12 $\frac{1}{2}$, and that the entire proceeds of the collection of said harbor tax must be used exclusively for construction of Lake Calumet Harbor.

(No. 6231—June 5, 1928—L. H.)

TRUSTEE'S CERTIFICATES, FORM, RIVER STRAIGHTENING.

Trustee's certificates issued in pursuance of the River Straightening Ordinances of July 8, 1926, and July 25, 1927, and also the order providing for their execution are in two forms: Form A is intended for parties who are not to receive interest for the land conveyed; form B are for parties or their assigns who are entitled to interest; which certificates must be signed by the City Comptroller and City Treasurer.

Hon. Charles C. Fitzmorris, City Comptroller:

Pursuant to your request, we have examined proofs of two forms of Trustee's Certificates, marked respectively A and B, which are to be issued by the Foreman Trust & Savings Bank, as trustee under the River Straightening Ordinances of July 8, 1926 and July 25, 1927.

Form A is designed to be issued to such parties as will receive no interest for the land conveyed by them. Form B is intended to be issued to such parties or their assigns as will receive interest on the moneys due them for lands conveyed by them. The proposed certificates as

shown by these proofs appear to be in strict conformity with the ordinances mentioned. The only question that has arisen was with respect to the agreements appended to them which are to be signed by officers of the City of Chicago.

Under the supplemental ordinance passed on July 25, 1927, the City of Chicago is made the guarantor and is bound to supply any deficiency that may arise, so that the certificates may be paid in full, and in addition thereto it is made liable for the payment of interest semi-annually on such certificates as bear interest.

The City Council, under its delegated powers, had the right to authorize such an arrangement and to make the guaranties provided for by the ordinance of July 25, 1927. It failed, however, to indicate what officers of the City should sign the instruments designed to carry into effect such agreements and guaranties of the City. If any point were to be made on the propriety of attaching the signatures of the City's officers, it could only be made on this failure to designate the officers.

In order to overcome any objections thereto, we deem it proper that the City Council should, by order, authorize the signing of such agreements and guaranties, and designate in such order the officers that are to do it. To this end we have forwarded a letter to the City Council and submitted therewith draft of an order, and we have recommended that the same should be passed at the meeting to be held on June 6, 1928, so that no delay may ensue on account of the omission of this formality. The order as drafted by us specifically authorizes the Comptroller and Treasurer to sign. When this order is passed by the City Council, it will be entirely proper for the City Comptroller and City Treasurer to sign the blanks at the bottom of the certificates as shown on forms A and B.

(No. 6232—June 7, 1928—G. F. M.)

1 DISABILITY BENEFITS, STATUTE OF LIMITATIONS.

The five year statute of limitations applies to a claim of a municipal employee for disability benefits.

2 DISABILITY BENEFITS, LAW GOVERNING.

The rights of a municipal employee to disability benefits depend upon the law in force at the time such rights accrue and not upon the law existing at the time claim is made.

Retirement Board, Municipal Employees' Annuity and Benefit Fund:

Replying to your request for an opinion as to the disability pension rights of Mrs. Edith McGinty, an employee of the City of Chicago, and a member of the Municipal Employees' Annuity and Benefit Fund, the following is submitted:

Your letter states that Mrs. McGinty has presented a claim for ordinary disability benefits following the birth of a child; that this disability accrued from January 7, 1921, to May 15, 1921; and that she presented her claim on May 18, 1928.

There are two objections to the allowance of this claim—

1. The Statutes of Illinois bar the recovery of any open account claim for money on which suit was not instituted within five years from the date on which the right to such money accrued. This claim is seven years old.

2. The disability in question having occurred prior to the coming into force and effect of the Municipal Employees' Annuity and Benefit Fund Act is dependent upon the provisions of the Municipal Employees' Act of 1911. The Act of 1911 does not provide for disability benefits,

but does provide for a pension to one who retires from active service on account of serious disability. Mrs. McGinty is still in the active service.

I am of the opinion that Mrs. McGinty is not entitled to any disability benefits from your fund.

(No. 6233—June 7, 1928—F. J. V.)

1 DIVISION FIRE MARSHAL, ELIGIBLE LISTS, CIVIL SERVICE.

The eligible lists of August 23, 1915, and of August 17, 1921, for the position of Division Fire Marshal are no longer in effect.

2 ELIGIBLE LISTS, CANCELLATION, CIVIL SERVICE.

An eligible list which has expired by limitation under the rule of the Commission cannot be made the basis of a certification thereunder and requires no cancellation.

Hon. A. W. Goodrich, Fire Commissioner:

We are hereby replying to yours of the 4th instant requesting information and direction in the matter of the eligible list for the position of Division Fire Marshal, and what to do to bring about the cancelling of such list.

Investigation of the Civil Service records discloses two lists, one posted August 23, 1915, containing the names of Thomas P. Kenny, Michael S. Kerwin and Frank A. Grady; the other list, posted August 17, 1921, containing the names of Edward F. McGurn and Francis F. Byrnes.

Prior to December 12, 1924, the Rule applying to cancellation of registers was as follows:

“Eligible registers shall expire by limitation of time in two years and one day from day of posting thereof,

unless the commission before the expiration of such time on any register shall order otherwise."

Since December 12, 1924, the Rule, then amended, has been as follows:

"Names remaining on eligible registers for two years and one day shall continue to remain on such eligible registers, unless the same shall have been stricken therefrom by the commission." Sec. 6, Rule III.

On August 9, 1926, the rule as last stated was again amended by providing that as to Branch V, Class U non-competitive service (common laborers) shall expire by limitation of the time of two years and one day.

Upon the record of these lists, as above stated, both of such lists, in our opinion must have expired by virtue of the then existing rule of the limitation of two years and one day from the posting of the lists. And if such lists thus expired under the rule, then they could not be and were not, in our opinion restored or revived by the adoption of the new rule of December 12, 1924. Those lists are, therefore, no longer legally sufficient to warrant certification therefrom, and the cancellation thereof under the present rule would not be necessary.

(No. 6234—June 8, 1928—G. F. M.)

1 PHYSICAL AND MENTAL EXAMINATION, DEMENTIA
PRAECOX, CIVIL SERVICE.

A person suffering from dementia praecox (*) is not disqualified under the present Civil Service Law from assignment to a public service on account of physical or mental deficiency if he passed the required physical and mental examination which does not disclose such malady. This situation however could probably be corrected by civil service rule requiring each applicant to state in his application or in a separate sworn statement made prior to appointment that he is not then and never has been suffering from any mental or physical illness of a permanent or progressive nature.

2 INSANITY, DISCHARGE FROM INSTITUTION.

Insanity if established is presumed to continue until the contrary is shown and the discharge of a person from an asylum is evidence of his restoration to sanity.

(*) Dementia praecox is defined as adolescent insanity, a disorder which occurs in early life and is marked by melancholia and self-absorption terminating in a characteristic mental weakness of an emotional nature.

Hon. A. W. Goodrich, Fire Commissioner:

Replying to your request for an opinion as to the status and pension rights of Michael J. Browne, the following is submitted:

Your letter states that a report has been made to you to the effect that Michael J. Browne, fireman, assigned to Hook & Ladder Company No. 34, was committed to the Elgin State Hospital for the Insane on December 1, 1927; that this report indicates that Mr. Browne was confined in the same institution prior to his entry into the department, and that you desire to be advised as to whether

the evidence of Mr. Browne's mental incapacity prior to his entry into the Fire Department will in any way affect his right to be carried on the time rolls of your Department, or would affect his pension rights in the event application was made for pension on account of mental disability.

I have looked up the record of Mr. Browne in the County Court of Cook County and in the office of the Civil Service Commission. I find that Mr. Browne filed his Civil Service application under date of February 17, 1923, being application No. 2369; that he took the physical examination for fireman on February 20, 1923, and the days following; that on May 15, 1923, he was adjudged insane in the County Court of Cook County as a *dementia praecox*, and was sent to the Elgin State Hospital for the Insane, said proceeding being No. 76356 in the County Court of Cook County; that on July 14, 1923, he was paroled to his brother, William J. Browne, a policeman, then living at 3638 West 60th place; that on October 14, 1923, he was "discharged as improved" from the Elgin State Hospital; that two months later, viz., December 15, 1923, he took the mental examination for fireman and was duly appointed to the fire service on March 9, 1925; that on December 8, 1927, on the petition of his brother, William J. Browne, he was again adjudged insane and sent to the Elgin State Hospital for the insane, the medical commission having found he was suffering from "*old dementia praecox*," said proceeding being No. 96414 in the County Court of Cook County.

I inspected the Civil Service application filed by Mr. Browne and there does not appear to be on said application any inquiry as to his former mental or physical condition, nor any inquiry as to whether or not he had ever been adjudged insane.

At the insanity hearing on May 15, 1923, Michael Browne's brother testified that Browne was suffering from shell-shock. Physicians inform me that *dementia praecox* is a hereditary or systematic condition and cannot be caused by shell-shock, although shell-shock will aggravate the pre-existing disease.

Our Supreme Court has held that when insanity is established to have existed, it will be presumed that it continues until the contrary is shown (*Donovan v. St. Joseph's Home*, 295 Ill. 125); but said court has also held that the discharge of a person from an insane asylum may be regarded as evidence of his restitution to sanity. (*Clay v. Hammond*, 199 Ill. 370.) The discharge of Michael Browne from the Elgin State Hospital for the Insane on October 14, 1923, was not a discharge "as cured," but only a discharge "as improved," which would rather indicate that Browne was not mentally sound at the time he took the mental examination on December 15, 1923, nor at the time he was appointed into the service on March 9, 1925.

Neither the Civil Service Act, nor any other legislative enactment disqualifies a person from assignment to public service because of physical or mental deficiency so long as such person passes the required physical and medical examination. This situation should be corrected through the Civil Service Commission by requiring of each applicant a sworn statement, in his application, or in a separate statement made just prior to his appointment into the service, to the effect that the applicant is not then, and never has been suffering from any mental or physical illness of a permanent or progressive nature. With such a statement from an applicant, the condition found to exist in this case could not occur or could be readily remedied if the applicant misrepresented the facts. Under

the system of examination and certification now being followed, there is nothing to prevent consumptives, epileptics, syphilitics, cancerous persons, or the insane from being assigned to public service of any kind or character, unless the physical or mental defect is discovered during his physical and mental examination, which is not always possible or probable.

I am of the opinion that Michael J. Browne is legally a member of the Fire Department, as fully as though his affliction were physical instead of mental; and that he is entitled to the same rights as any other fireman, as long as he is permitted to remain in the service. Browne's mental condition, subsequent to his manifestation of *dementia praecox* in May, 1923, may have rendered him unconscious of any fraud upon the Department or upon the City of Chicago in seeking and securing service in the Fire Department after having been adjudged to be afflicted as he is.

I am of the further opinion that this case should be called to the attention of the Civil Service Commission by your Department, with a view to having safeguards instituted to prevent unfortunate victims of permanent and progressive physical or mental afflictions being certified into the public service.

(No. 6235—June 12, 1928—G. F. M.)

DUTY DISABILITY BENEFITS, ORDINARY DISABILITY
BENEFITS AND WORKMEN'S COMPENSATION AWARD,
PAYMENT.

Disability benefits received by a municipal employee before an award is made under the Workmen's Compensation Act must be repaid if less than the award and no further ordinary disability benefits should be paid until the total amount of benefits equal the amount of the award.

*Retirement Board, Municipal Employees' Annuity and
Benefit Fund:*

Replying to your request for an opinion in the matter of the disability benefits of Vincenzo Mazzara, the following is submitted:

Your letter states that Mr. Vincenzo Mazzara was injured on duty and received duty disability benefits from this fund from December 1, 1926, to February 1, 1927; that on this latter date he was ordered dropped from the list; that he applied to be restored to disability benefits, which application was denied but leave being given him to file an application for ordinary disability benefits; that he was granted ordinary disability as of September 29, 1927, at two dollars and seventy-one cents (\$2.71) per day; that Mr. Mazzara applied for Workmen's Compensation benefits on March 26, 1928, and was granted a settlement contract in the amount of thirty-four hundred and fifty-six dollars (\$3,456). Your question is as to whether or not you are to deduct from the amount which you have paid and may pay in the future, the amount which was received by him by virtue of the workmen's compensation award. Section 48 of the Municipal Employees' Annuity and Benefit Fund provides, in the third paragraph of said section as follows:

“If any municipal employee who shall be disabled shall receive any compensation from such city on account of such disability under and by virtue of the law known as the Workmen’s Compensation Act the disability benefit herein provided for such municipal employee shall be reduced by any amount so received if such amount shall be less than the amount of such benefit; and if the amount or amounts received as compensation exceed the amount of the disability benefit herein provided for such municipal employee, such municipal employee shall not receive any such disability benefit until a period of time during which such benefit payable at the rate herein stated would equal the amount of such compensation shall have expired. In calculating any such period of time, interest upon the amounts of money involved shall not be considered.”

I am of the opinion that under the above quoted provision of the law, Mr. Mazzara should be required to repay into your Fund the total amount of disability benefits heretofore paid to him and should not be paid any further benefits until such time as the total amount of benefits which he has been paid and to which he may hereafter become entitled, equal the total sum of thirty-four hundred and fifty-six dollars (\$3,456).

(No. 6236—June 13, 1928—G. F. M.)

1 POLICE PENSION, APPORTIONMENT, DEATH BETWEEN TWO ANNUITY PAYMENT DATES.

At common law, which is in force in Illinois, annuities are not apportionable with respect to time, except in case of support and maintenance of infants and where it is necessary for the support of a wife separately from her husband. So that in a case where the annuity does not fall within the two exceptions, the representatives of an annuitant cannot claim for any portion of a month during which the annuitant lived between annuity payment dates and had died before the date of payment.

2 POLICE PENSION, ANNUITIES, BASIS.

Under the present Policemen's Annuity and Benefit Fund Act annuities are computed according to the American Experience Table of Mortality and are so graded in amount as to provide for a possible death of annuitant before the date of payment, giving him a slightly larger monthly annuity than he would be entitled to otherwise.

Retirement Board, Policemen's Annuity and Benefit Fund:

Replying to your request for an opinion as to the apportioning of an annuity of a beneficiary of the Fund who died between two annuity payment dates, the following is submitted:

Your letter states that Mrs. Medora Johnson, a pensioner under the Act of 1915, as amended, died April 27, 1928; that no check was sent for the month of April; and that Attorney William A. Adams has made demand upon your Board to pay the pension for the month of April.

I. The common law is in force in Illinois, excepting where the same has been modified by statute. So far as the common law relates to annuities, it has been modified in a number of States, but has never been modified

or altered in Illinois, so that the common law governing annuities is still in force and effect in this State.

It has always been a uniform and unbending rule of the common law that annuities were not apportionable in respect of time, with two exceptions, viz.: (a) Where the annuity was for the support and maintenance of infants; and, (b) Where the annuity was for the support of the wife living separate and apart from her husband. The annuity in question here does not fall within either of the two classes of exception.

The latest pronouncement by any of the courts of this State touching upon the rights of the representatives of a deceased annuitant to a portion of an annuity, was by the Appellate Court of Illinois in the case of *Bell v. Egelhoff*, 204 Ill. App. 618, in which the court reiterated this principle of the common law that "if an annuitant dies before the day of payment, his representative cannot claim any portion of the annuity for the current term."

II. In addition to the rule of law hereinabove referred to, your Honorable Body is deterred from apportioning annuities, by the very nature of the annuity payments provided for in the Act you are administering.

Section 28 of the Policemen's Annuity and Benefit Fund Act provides that all annuities shall be computed according to the American Experience Table of Mortality. I am informed that the annuities payable under this Act have been based upon the assumption that a certain percentage of deaths would occur each year, and that the annuities have consequently been so graded in amount as to provide for the possible death of an annuitant before the day of payment, with the result that each annuitant receives a slightly larger monthly annuity than would be the case if annuities were to be apportioned as herein sought to be done. I am further informed that under

the system followed in the preparation of this particular Annuity and Benefit Fund Act, the entire Fund would be thrown out of balance were annuities to be apportioned in violation of the rule of the common law, as apportionment would result in the payment of a larger amount of annuity in each case of a person dying between annuity payment periods than the accumulations of such person were estimated or computed to purchase. As the Act now stands, were the common law rule as to annuities changed by our Legislature so as to make annuities apportionable, it would be necessary to amend the Policemen's Annuity and Benefit Fund Act so as to reduce the amount of annuities now payable under that Act, in order to provide for the safety and stability of the Fund under a system of apportionable annuities.

III. While it may at first seem unreasonable to refuse to pay any portion of an annuity because the annuitant died before the end of the month, and therefore before the annuity was due, this course has been followed uniformly and without exception since the present Act came into effect; it is not unreasonable when it is considered that the annuity payments received by the deceased annuitant were in a larger amount than they would have been were annuities apportionable. In any event, no other course is permissible to your Honorable Body until the courts change their decisions or the Legislature changes the law.

I am of the opinion that under the law as it now exists in Illinois, as well as under the system of computations followed in the construction of your annuity system, an annuity is not apportionable for any portion of a month during which the annuitant lived between annuity payment dates, when the annuitant dies before the day of payment.

(No. 6237—June 15, 1928—G. F. M.)

1 FIREMEN'S PENSION, CERTIFICATION OF NAME OF DECEASED, CIVIL SERVICE.

The want of certification from an eligible list of the name of the deceased, does not deprive his widow of a pension on account of the death of her husband who died as the result of injuries sustained in the performance of his duties as fireman pending the preparation of an eligible list and certification therefrom.

2 WORDS AND PHRASES.

A "fireman" within the meaning of section 13 of the Firemen's Pension Fund Act may be one who has fully qualified for appointment under the Civil Service Law and has been called into actual service during a fire while awaiting appointment pending preparation of an eligible list and certification therefrom.

3 WORDS AND PHRASES.

"While in the service" in section 10 of the Firemen's Pension Fund Act (Smith's Stat. 1927, page 536) applies to a person who has been appointed to a position classified by the Civil Service Commission as in the fire service of the City and is acting as such appointee during a fire.

Board of Trustees, Firemen's Pension Fund:

Confirming verbal opinion rendered at the last meeting of your Board as to the pension status of Florence Giese, widow of Emmet A. Giese, the following is submitted:

Owing to the Civil Service eligible list for Firemen being exhausted in November, 1927, it became necessary that men be appointed to positions as firemen in the Fire Department under sixty day authority because of insufficient man power in that Department and the approach of the heavy fire period.

I am informed that Emmet A. Giese had taken the examination for fireman in October, 1927, and that pend-

ing the preparation of an eligible list following the said examination, Mr. Giese was appointed to the Fire Department pursuant to the provisions of section 10 of the Civil Service Act.

I am also informed that Mr. Giese passed the examination hereinabove referred to; that his name appeared on the eligible list for firemen issued subsequent to the said examination; that he became and was eligible to appointment as a Civil Service appointee; that, had he not died, he would have been duly certified by the Civil Service Commission; and that he died on April 9, 1928, as the result of injuries received on March 24, 1928, through the falling of a portion of a burning building at a time when he was acting and serving as a member of the Fire Department at work at that particular fire.

Section 13 of the Firemen's Pension Fund Act provides that "in cities which have adopted an Act entitled 'An Act to regulate the Civil Service of cities,' approved and in force March 20, 1895, all persons who have been or shall hereafter be appointed to any position which is classified by the Civil Service Commission of such city in the fire service of such city * * * shall be included within the meaning of the word or term 'fireman' or 'firemen' as used in this Act."

Under the facts as presented to me, it appears that Emmet A. Giese was legally and properly appointed to service in the Fire Department originally; that his service in such Department pending preparation of an eligible list and certification from such list, entitled him to be considered as a person "appointed to a position classified by the Civil Service Commission in the fire service of the City" within the meaning of the Firemen's Pension Fund Act; and that his death resulting from injuries sustained in the performance of his duty as a fireman having oc-

curred before he was actually certified from the eligible list upon which his name appeared, does not deprive his widow of the pension provided for the widows of firemen who die from injuries received "while in the service" as provided for in section 10 of the Firemen's Pension Fund Act.

I am, therefore, of the opinion that Florence Giese is entitled to be paid a pension by your Honorable Body as the widow of Emmet A. Giese.

(No. 6238—June 15, 1928—F. J. J.)

STARS AND BADGES, MANUFACTURE AND SALE, WRITTEN AUTHORITY NECESSARY.

The indiscriminate manufacture and sale of official seals, emblems, stars and badges pertaining to Municipal Government of the City of Chicago with various designation of officers and departments is against the policy of the statutes and ordinances but such seals, emblems, stars and badges may be manufactured and sold upon the written order of an executive head of a department of the Municipal Government who alone has authority to use the same and to authorize their use by his subordinates.

Hon. Michael Hughes, Commissioner of Police:

We are in receipt of your letter of May 22, 1928, enclosing therewith, copy of letter from the Columbia Stamp Works, 430 South Dearborn street, inquiring just what type of stars or badges bearing the seal of the City of Chicago and the emblems of its various departments they are permitted legally to manufacture within the law and what type of stars or badges would be a violation of the

law, if manufactured by them, and a request for an opinion on this subject.

Chapter 22, of the Chicago Municipal Code of 1922, article 2, covers in its provisions, the forms, emblems, symbols, and devices, setting forth the proper devices and emblems for each department of the Municipal Government and likewise, section 1026, expressly prohibits their use by private persons.

The Statutes of the State of Illinois, chapter 38, paragraph 270, section 114 provide for a penitentiary sentence for anyone counterfeiting or having in his possession or using a counterfeit of the seal of this State or the seal of any court or public officer entitled by law to have and use a seal or the seal of any public, municipal, or private corporation.

The question involved in your letter seems to us to be whether or not the Columbia Stamp Works or any other company can manufacture, without express written authority, seals, emblems, stars, and badges which in themselves would be a duplication of the official seals, emblems, stars, and badges of the Municipal Government or any of its departments, and we cannot help but feel that such manufacture would naturally result in the indiscriminate sale and distribution of such seals, emblems, stars, and badges to persons who might be wholly unauthorized to have same in their possession or to use the same and would, in a short time, result in much confusion, brought about by such persons misrepresenting themselves as having authority which in no way was vested in them.

The executive head of a department of the Municipal Government is properly authorized to have, use, and display a seal, badge, star, and emblem, as prescribed by the ordinance above referred to, and it is undoubtedly

within the power of such executive to designate those of his subordinates as may be entitled, also, to use and display the same.

These emblems, seals, stars, badges, etc., could then be manufactured upon the express written order of such executive and, in our opinion, this authority would be sufficient to protect the manufacture of the same from any possible prosecution under the statute or the ordinances hereinabove referred to.

It is our opinion, therefore, that the manufacture of emblems, seals, stars, and badges, pertaining to the Municipal Government of the City of Chicago, bearing the seal of the City of Chicago, with various designations of officers and departments, is prohibited, unless by express written authority from such executives as, under the Municipal Code, are entitled to the use of emblems prescribed for their departments, and the manufacture of such stars and badges should only be on such express written authority.

(No. 6239—June 26, 1928—L. H.)

1 WATER MAINS, TAPPING, PERMISSION, PUBLIC UTILITIES.

An Order of the City Council permitting a plumber to tap a water main to furnish a specific number of residents does not give such plumber the right to tap the water main in other cases and in effect operate a public utility.

2 WATER SYSTEM, PRIVATE WATER PIPES, REMOVAL.

Private water pipes in annexed territory cannot be forcibly seized but may be ordered taken up upon giving reasonable notice to the owners to remove the pipes.

3 PRIVATE WATER PIPES, USE.

The City should avoid making use of private water pipes in annexed territory, as such use may be made the basis of a claim against the municipality.

Hon. Richard W. Wolfe, Commissioner of Public Works:

Your letter with respect to the private water pipes attached to the City's water system in the districts recently annexed to the City of Chicago was referred to the undersigned for consideration and reply.

The letter, which originated with the Engineer of Water Pipe Extension, states that private water pipes are being operated in the two tracts of which plats were submitted, both of which are now within the limits of the City. One of these tracts, which may be designated in a general way as the tract west of Nagle avenue, was annexed by the voters at an election held June 6, 1927. (See Council Journal, July 13, 1927, pp. 670-671.) The other tract, which may be designated as the tract west of Harlem avenue and south of Irving Park boulevard, was annexed by ordinance passed on February 29, 1928. (See Council Journal, pp. 2225-27.) Both of these tracts were unincorporated territory before annexation.

The question you ask is whether or not the City of Chicago, through its Bureau of Water, has full legal right and warrant to take over the private water systems existing in these tracts, make connections, and install water mains and appurtenances for the purpose of furnishing water to the inhabitants thereof.

From the information at hand, it appears that, prior to annexation, the City Council from time to time passed various orders authorizing the tapping of the City's water mains for the purpose of supplying water to the people living on this territory beyond the City limits. A long list of persons who secured such permission has been submitted to us by you at our request. In most instances—perhaps in all but one—these parties have been obtaining water for their own use. In at least one case the party who secured the permission to tap the water main has been furnishing water to other parties for compensation. The pipes used by these permissive users are not like the City's standard equipment, and the City would sooner or later remove them and replace with new pipes.

With respect to the party furnishing water to others, the writer has received three letters from attorneys purporting to act for him. These indicate that it is assumed that the City is interfering with his rights.

The party in question is one Frank L. Thompson, and he apparently bases his rights on an Order of the City Council passed April 1, 1925 (Council Journal, p. 5254), which reads as follows:

“Ordered, That the Commissioner of Public Works be and he is hereby directed to allow Frank Thompson, a licensed plumber, to tap the water main in Irving Park boulevard and North Harlem avenue with three-inch pipe and meter, to supply three houses in Norwood Township.”

The order above quoted is not sufficient to authorize the operation of a public utility in the streets of the City. The most that can be said for it is that the permission to supply the three houses with water may continue until such time as the City puts in its standard equipment and begins furnishing water directly to these premises.

While the owners of pipes in the streets have no rights in them except a permissive one, the City has not the right to seize them or forcibly take them over. It can order them to be taken up, and in such case all that need be done is for the Commissioner of Public Works to give reasonable notice requiring the removal of the pipes. After due notice the pipes may be forcibly removed by the Commissioner. Aside from the possibility of working a hardship on the parties depending on them, which would result in case the removal was required before the City's standard equipment was installed, no other obstacle presents itself to disposing of the matter in this way. We recommend that no use be made by the City of any of these private pipes, since that might result in the owners making claims against the municipality.

(No. 6240—June 28, 1928—F. J. C.)

1 ZONING, PERMIT.

A building permit under the Zoning Ordinance is subject to covenants, if any, that run with the land stated in the plat of the subdivision involved and incorporated in the deeds of conveyance.

2 ZONING, LIMITATIONS UPON.

Rights acquired under restrictions contained in covenants or deeds of conveyance run with the land and cannot be interfered with or effected through the Zoning Ordinances without the consent of the parties interested in such lands.

Mr. Geo. L. Blond, Chicago:

Your letter of recent date to Mr. Ettelson has been referred to the writer for attention.

We have made an investigation of the status of the property you refer to in your letter. Under the provisions of the Zoning Ordinance in force in the City of Chicago we find that the locality of the property appears on map 18, section 4 of the Zoning Ordinance and is in a district zoned as a first volume apartment district. By this we mean that the City Council in passing the Zoning Ordinance designated this property as property upon which could be erected an apartment building of the first volume.

The use map before referred to indicates that 50 per cent of the area of the lot contemplated to be built on can be used in the erection of a building, but such building is limited to 33 feet in height.

We have been unable to discover anything in the records of the Zoning Board of Appeals which would indicate that any application has been made for the erection of an apartment building in the block named in your let-

ter. The ordinance as it is now in force does not restrict this district to one family residence uses but allows the erection of an apartment building which may be built in accordance with the provisions of the ordinance.

We see no reason why a permit should not be issued by the Building Commissioner for the erection of an apartment building conforming to the provisions of the ordinance, unless there is some covenant running with the land stated in the plat of subdivision and incorporated in the deeds of conveyance which create such a restriction on use of the land. It has been the policy of the Law Department and the Zoning Board of Appeals to refrain from passing judgment on rights acquired under restriction contained in covenants in the deed of conveyance running with the land. If there is a restriction in the deed or the plat such restriction is enforceable by persons who are immediately affected in their interests by reason of the covenants contained in such deeds of conveyance. The officials of the City who have to do with the enforcement of this Zoning Ordinance have only such powers to enforce it as are contained in the Zoning Ordinance and in the statute fixing their powers. The question of private rights being of a judicial character enforceable in courts of law cannot be considered by the enforcing officers of the Zoning Ordinance because their powers are limited to the terms and provisions of the Zoning Ordinance. Where there is a violation of the ordinance, then the City officers could and would intervene to enforce the provisions of the ordinance. In this situation the City officers are bound by the fact that the City Council has designated the use to which the property in question may be put.

There is one method by which the condition as it now exists with reference to the zoning use may be remedied, and that is that the property owners in the immediate

vicinity could make application to the City Council to change this district from an apartment to a residence district. Apparently you were misinformed as to the use for which this property was zoned.

(No. 6241—June 29, 1928—G. F. M.)

POLICE PENSION, CHILD.

The child of a policeman's wife who has been divorced and not remarried to him is entitled to \$25 per month pension under the Policemen's Annuity and Benefit Fund Act.

Retirement Board, Policemen's Annuity and Benefit Fund:

Replying to your request for an opinion as to the annuity rights of Janice Esau, minor child of Arthur F. Esau, deceased patrolman, the following is submitted:

Your letter states that Mrs. Jeanne Esau has applied for an annuity on behalf of her daughter, Janice, who was born January 22, 1924; that Arthur F. Esau, a patrolman, the father of the above mentioned child, was divorced from Mrs. Esau October 11, 1927; that he died April 27, 1928, while a member of the Police Department, and without having remarried. Your question is as to whether the monthly payments to the minor child should be at the rate of \$10 per month, or \$25 per month.

Section 44 of the Policemen's Annuity and Benefit Fund Act, in the third paragraph provides that "any such annuity shall consist of the amount of \$10.00 per month for each child while the widow or widower of the deceased policeman parent of such child shall survive, and of \$25.00

for each month such child while no widow or widower shall survive.”

The fourth paragraph of the same section reads as follows: “Any annuity which shall be granted for the benefit of any child shall be paid to the parent of such child who shall be providing for such child, unless another person shall have been or shall be appointed by a court of law as the guardian of such child.”

Mrs. Esau having been divorced from Arthur F. Esau on October 11, 1927, ceased to be his wife from and after that date; and not being his wife at the time of his death, was consequently not his widow after he died. Ceasing to be his wife, she could not become his widow. *Jordan v. Clark*, 81 Ill. 465, 467-8.

If Arthur F. Esau did not remarry subsequent to the divorce referred to, he left no widow at the time of his death, and his minor child would therefore be entitled to the benefit of that provision of section 44 which provides that an annuity shall consist “of \$25.00 per month for each such child while no such widow or widower shall exist.”

Upon the facts presented, I am of the opinion that Janice Esau is entitled to be paid an annuity of \$25 per month as the minor daughter of Arthur F. Esau, deceased patrolman, and that such annuity shall be paid to the mother of the child unless some other person shall have been or shall be appointed by a court of law as the guardian of such child.

(No. 6242—June 30, 1928—L. H.)

1 TAX LEVY ORDINANCE, AMENDMENT.

The amendment or repeal of a part of a tax levy ordinance is permissible but it is inadvisable if it has been certified to the County Clerk and tax anticipation warrants have been issued against it.

2 TAX LEVY ORDINANCE, REQUIREMENTS.

The items in the Tax Levy Ordinance must agree with items in the Annual Appropriation Ordinance.

Hon. John S. Clark, Chairman, Committee on Finance:

We are in receipt of your letter of recent date relating to the tax levy for the purposes of the Calumet Harbor. You ask for an opinion as to whether or not this levy may now be repealed.

The Tax Levy Ordinance was passed on January 28, 1928. Among the items specifically levied for was the sum of \$1,200,000 for Calumet Harbor. You state that when this ordinance was passed it was understood that the levy was to be outside of the maximum corporate tax rate of \$1.125 on each one hundred dollars, but that you are now informed that such levy will have to be included in the maximum rate. Since the General Corporate Fund will suffer to the extent of this levy, which calls for a tax of a quarter of a mill on the dollar, a deficit will follow which the City Council may desire to avoid.

To repeal the levy for Calumet Harbor purposes it would be necessary to amend the Tax Levy Ordinance. There is a provision in the statutes which prevents the amendment of the annual appropriation bill at any other time except the regular meeting held not less than five days thereafter following the meeting at which it is passed. This does not apply to the Tax Levy Ordinance.

There does not appear to be anything in the statutes which prohibits amendment of the Tax Levy Ordinance. Complications may follow its amendment at the present time, by reason of the fact that the Tax Levy Ordinance has been certified to the County Clerk, and by reason of the further fact that tax anticipation warrants have been issued against it but such complications, while they may give rise to unexpected situations, would probably not result in rendering the ordinance void. Therefore, if it is essential that the levy for this purpose should be repealed, we believe it can be done without serious danger to the rest of the levy.

We deem it our duty, however, to call your attention to the fact that such a change would not have the effect of increasing the levy for other purposes. The items in the Tax Levy Ordinance must agree with the items in the Annual Appropriation Ordinance. (See *People ex rel. Fuller v. P., D. & E. R. R. Co.*, 116 Ill. 410; *C., I. & W. Ry. Co. v. People ex rel. Randolph*, 207 Ill. 566.) If the Tax Levy Ordinance were so amended as to take out this item, which under the law is not reducible when the scaling takes place, and the amount of the levy were to be distributed among other items which are subject to scaling, we are constrained to say that the procedure would be fraught with great danger to the balance of the levy, and the cutting out of this item would almost certainly be held to be a reduction of the levy. In other words, we would lose the levy of the quarter of a mill altogether, and portions of the balance of the levy might be endangered.

Our recommendation, in view of all the circumstances, is that no change should be made at this time in the Tax Levy Ordinance. Such changes as have been proposed partake of the nature of tinkering, and that often leads to unforeseen results.

(No. 6243—July 2, 1928—W. V. D.)

CLAIMS, BACK SALARY, MUNICIPAL EMPLOYEES.

Back salary of a municipal employee or an appointee is not recoverable without first establishing a legal right to the office or position on account of which the salary is claimed; and which fact should be established by mandamus or certiorari before the position is filled.

Hon. John S. Clark, Chairman, Committee on Finance:

Replying to your request of March 5, 1928, for an opinion as to the validity of claim No. 8609 of Mrs. Susan Sexton for back salary, in order to recover salary for a period of time during which she claims she was wrongfully prevented from filling the position, she must first establish her legal right to the office or position. This can only be done by direct action of mandamus or certiorari. *McNeill v. City of Chicago*, 212 Ill. 481; *Moon v. The Mayor et al.*, 214 Ill. 40; *Bullis v. City of Chicago*, 235 Ill. 472.

On being reinstated by mandamus or certiorari a right of action in assumpsit or debt accrues for back salary. In an action of this kind the City may interpose the defense that the salary was paid to a *de facto* employee in good faith. *People ex rel. v. Burdette*, 283 Ill. 124; *People ex rel. McDonald v. Thompson*, 316 Ill. 16.

The claimant should have attempted to establish her legal right to the position by mandamus and not wait while the position was filled by others to whom the City paid the salary.

(No. 6244--July 18, 1928--G. F. M.)

1 MUNICIPAL EMPLOYEES' PENSION, ANNUITANTS.

A municipal employee regularly appointed from an eligible list and under probation is entitled to the benefits of the Municipal Employees' Annuity and Benefit Fund Act from the time he is appointed until separation from the service; 60 day appointees are expressly excluded from said law.

2 MUNICIPAL EMPLOYEES' PENSION, TRANSFER TO DIFFERENT CLASS OF SERVICE, LOSS OF BENEFITS.

An employee who is transferred either in the same or another department to a different class or grade of service than the one to which he was certified under the Civil Service Law loses the benefits arising from the Municipal Employees' Annuity and Benefit Fund Act.

3 WORDS AND PHRASES.

The words "temporary appointment" in section 12 of the Municipal Employees' Annuity and Benefit Fund Act has reference to 60 day appointments and not to appointments made from an eligible list on probation under the Civil Service Law.

Retirement Board, Municipal Employees' Annuity and Benefit Fund:

Replying to your request for a rule covering employees who are called for emergency work and are appointed under temporary authority, although their names appear on the eligible list of the Civil Service Commission, the following is respectfully submitted:

Section 12 of the Municipal Employees' Annuity and Benefit Fund Act specifically provides that the definition given in the Act to the phrase "Municipal Employee," and for whom disability benefits are provided for by the Act, "shall not include and this Act shall not apply to any person employed in the service of such city * * *

by virtue of temporary appointment as defined in section 10 of said 'Act to regulate the Civil Service of Cities.' "

Section 10 of the Civil Service Act provides that whenever the head of the department or office in which a position, classified under Civil Service, is to be filled, shall notify said Commission of that fact, said Commission shall certify to the appointing officer the name and address of the candidate standing highest upon the register for the class or grade to which said position belongs; that such appointment shall be on probation for a period to be fixed by the rules of the Commission; that at or before the expiration of the period of probation the head of such department or office, may discharge the person so appointed, by and with the consent of the Commission, and by assigning, in writing, his reasons therefor; and that if he is not then discharged, the appointment of such employee shall be deemed complete. The last sentence of section 10 reads as follows:

"To prevent the stoppage of public business, or to meet extraordinary exigencies, the head of any department or office may, with the approval of the Commission, make temporary appointment to remain in force not exceeding sixty days, and only until regular appointments under the provision of this Act can be made."

It is apparent that the only "temporary appointment" provided for in section 10 of the Act is the one designated in the last sentence of that section hereinabove quoted. The other appointment made by the Civil Service Commission and subject to a period of probation, is not a "temporary appointment" as the appointment becomes permanent if the appointee is not formally discharged within the period of probation; in other words, it is a permanent appointment subject to being defeated by the discharge of the appointee within a certain period

after his appointment, which period is known as a period of probation.

Under these circumstances, it follows that a person appointed from the eligible list to a position in the service for which he has qualified, becomes entitled to the benefits of the Municipal Employees' Annuity and Benefit Fund Act from the time of his appointment until a separation from the service; and that those appointed under that provision of section 10 hereinabove quoted with a limitation of sixty days of service, are not entitled to the benefits of the Act.

Upon this basis, it would seem that a Civil Service Municipal Employee, certified to a position classified under Civil Service as of a certain class or grade, and who is transferred, assigned or appointed to a different form of service either in the same department or in another department, loses his rights to the benefits of this Act when the kind of work to which he is so assigned, is a position classified under the Civil Service Act as of a different class or grade than the one to which he was assigned as a result of the civil service examination; and that a person who has qualified for appointment under a civil service examination for appointment to a position classified in a certain class or grade, is entitled to the benefits of this Act when he is assigned or appointed to work in such class or grade, from the time of his appointment until his services cease.

I am, therefore, submitting, attached hereto, a form of rule to be adopted by Your Honorable Board, conformable to the above opinion.

RESOLUTION.

It is hereby resolved by the Retirement Board of the Municipal Employees' Annuity and Benefit Fund of the

City of Chicago, that it shall be a rule of this Board that any person appointed to a position classified by the Civil Service Commission as of the class and grade to which such person is entitled to appointment by virtue of the civil service examination, shall be entitled to the benefits of the Municipal Employees' Annuity and Benefit Fund Act from and after the time of his appointment and during his service with and for the City of Chicago.

(No. 6245—July 19, 1928—G. F. M.)

WORDS AND PHRASES.

The phrase "injury incurred in the performance of an act or acts of duty" in the Municipal Employees' Annuity and Benefit Fund Act means bodily hurt or injury and not physical or mental condition gradually developed from disease or other afflictions, unless the latter originates from some specific physical hurt incurred in the performance of an act or acts of duty.

Retirement Board, Municipal Employees' Annuity and Benefit Fund:

Replying to your request for an opinion as to the meaning of the phrase "injury incurred in the performance of an act or acts of duty" as used in the Municipal Employees' Annuity and Benefit Fund Act, the following is submitted:

The uncertainty of meaning and application of said phrase arises mainly because of the word "injury" and the question as to what "injury" includes, that is, whether it is confined to physical hurts suddenly received, or does it include what are generally termed diseased conditions

arising out of one's employment, such as pneumonia from undue exposure, rheumatism, or other afflictions not usually the result of violence.

Webster defines "injury" as "damage or hurt done to or suffered by a person or thing"; the Oxford Dictionary defines "injury" as "hurt or loss caused to or sustained by a person or thing"; Funk & Wagnall's Dictionary defines the word "injure" as "to inflict harm or injury upon"; Pope's Legal Definitions (Vol. 1), states that "contracting a disease is being 'injured' within the meaning of a Wisconsin State Law granting pensions to families of policemen who should die as the result of injury received in the line of duty"; and "Words and Phrases" (Vol. 4) states that "to injure means to do harm to; inflict damage or detriment upon; impair or deteriorate in any way," citing *State ex rel. Star Publishing Company v. Associated Press*, 159 Me. 410. The Standard Dictionary states that "to injure means to harm, to inflict damage or detriment upon; to impair or deteriorate in any way."

The Supreme Court of Illinois, in the case of *Gillman v. Chicago Railways Company*, 268 Ill. 309, states that "injury means detriment, hurt, harm or damage."

In the case of *Christian v. State Conservation Commission*, 182 N. Y. Supp. 347, the court says: "In common speech, injury signifies bodily hurt suddenly inflicted. It never denotes an internal ailment which has gradually developed; in other words, it is an *infliction* not an *affliction*."

There is a marked difference between receiving a physical hurt and developing a malady. Each is an "injury" in the sense that each constitutes a damage, hurt, detriment, impairment, physical depreciation, harm and deterioration. It is apparent, however, in reading the Mu-

municipal Employees' Annuity and Benefit Fund Act that the provision relative to the payment of duty disability benefits was intended to apply only in cases where the municipal employee suffered from bodily hurt in the performance of an act or acts of duty. It will be noted that section 46 of the Act does not provide duty disability benefit for a municipal employee who shall become disabled as the result of conditions developing out of or resulting from the performance of an act or acts of duty, but provides such disability solely in cases where the employee becomes disabled as the result of *injury incurred in the performance* of an act or acts of duty; in other words, it is very apparent that the injury from which the disability must arise to entitle the employee to duty disability benefit, is an injury or physical hurt which was actually *incurred in the performance* of an act or acts of duty and not an injury or physical impairment, *developing out of* such performance of duty.

While it is true that under Pope's Legal Definitions hereinabove referred to it has been held that "contracting a disease is being injured," the holding or definition is based upon the case of *State ex rel. William McManus v. Board of Trustees of Policemen's Pension Fund*, reported in the 138th Wisconsin (p. 133), in which case there was filed a dissenting opinion based on far better reasoning than is the majority opinion of the court. While opinions of foreign courts or jurisdictions are not binding on us, but are advisory only, they are of doubtful value even in an advisory capacity when there is a dissenting opinion in the case, and particularly when the dissenting opinion is a better reasoned opinion than is the opinion of the majority of the court. In the dissenting opinion referred to in the *McManus case*, the following language is used, which I quote here because of its appropriate application to the question before us:

"I will not pay so little heed to what I believe to be ordinary understanding of ordinary persons, as to spend time demonstrating that, while a disease as well as an injury may create damage, it is false logic to urge that an injury, in the ordinary sense, is a disease, or a disease is an injury in any other sense than that it injuriously affects the afflicted one, causing damage.

"When we speak of a person as having been injured in the army or in railroad employment, or in the performance of duty of keeping the peace, or protecting society from criminal offenders, or apprehending such offenders, or in any other occupation exposing one to peculiar dangers as to bodily injuries, what do we mean by the term 'injury'? In other words, what is its plain, ordinary meaning as applied to such situations? I venture to say the universal answer must be a physical hurt—a wounding of the body."

The language of section 46 confines the payment of duty disability benefit for a case of disability resulting from *injury incurred in the performance of an act* or acts of duty and not to cases of disability *resulting from* the performance of an act or acts of duty, and I am of the opinion that the phrase "injury incurred in the performance of an act or acts of duty" as used in the Municipal Employees' Annuity and Benefit Fund Act means a bodily hurt, a wound, bruise or the like; it was not intended to include physical or mental deterioration developing by process of gradual growth from a malady, disease, or other affliction even though the latter is the result of the performance of acts of duty, unless the latter had its origin in *some specific and definite physical hurt, wounding or bruising* incurred in the performance of such act or acts of duty.

It does not necessarily follow that the physical hurt, wounding or bruising is confined to cases resulting from *external* violence, but such physical hurt, wounding or

bruising might be the result of *internal* violence, as in the case of a sudden physical strain thrown upon an employee resulting in the development of a hernia, or the bursting of a blood vessel through a suddenly applied strain, or similar instances; but in these latter cases it would require a medical opinion, as well as other evidence, as to whether or not the injury complained of resulted in any measure from any physical defect which existed at the time such injury was sustained, in which latter event, duty disability of fifty per cent (50%) of salary instead of seventy-five per cent (75%) of salary would be payable under the provisions of section 46.

No hard and fast rule can be laid down applicable to all cases which may come before your Honorable Body, other than as is hereinabove indicated. Each case must rest upon its own facts, and in each case it will be necessary to have evidence, medical or otherwise, to establish the fact as to whether the disability in question in the respective case was the result of *injury incurred in the performance* of an act or acts of duty, or was merely disability *resulting from* the performance of such act or acts of duty.

(No. 6246—July 21st also October 18, 1928—M. H. F.)

1 CONSULS, MUNICIPAL TAX AND LICENSE EXEMPTION.

It is the policy of the City of Chicago to reciprocate courtesies extended to the United States consular representatives of foreign countries in accordance with conventions, treaties or agreements entered into between the United States and a foreign government; and as a consequence, the municipal government of Chicago exempts from municipal tax and license permanent principal consular officers stationed in Chicago who are not engaged in any profession, business or trade.

2 CONSULS, EXEMPTION, EVIDENCE, ORDINANCE.

Consuls and other authorities representing foreign governments are by Ordinance of March 10, 1928, exempt from payment of license fees within the City of Chicago if the exemption is evidenced by the Mayor's signature.

Hon. Zdzislaw Kurnikowski, Consul General, Republic of Poland:

Your communication of recent date, addressed to Honorable William Hale Thompson, Mayor, has been referred to this department for consideration and reply.

You state that under an Act passed by the Polish Parliament persons enjoying the privilege of extra-territoriality and the permanent principal consular officers of the foreign countries are exempted in Poland from municipal taxes; that the application of this Act is conditioned upon reciprocity on the part of the respective appointing countries in regard to the diplomatic and consular officers of Poland of the same category; and you inquire whether, or not, under the Ordinances of the City of Chicago, the Polish diplomatic and consular officers of the same category, stationed in this City, would be entitled to the same exemption, or, whether or not, they would be granted the

same exemption on the principle of reciprocity. With your communication you have forwarded what you state is an English translation of the above mentioned Act of the Polish Parliament.

We know of no Ordinance of the City of Chicago which relates to this matter, but have the honor to inform you that it has been and is now the policy of the City of Chicago to reciprocate courtesies extended to the United States Consular representatives in foreign countries in accordance with conventions, treaties or agreements entered into between the United States and the governments of such foreign countries. Where entitled to exemption under such treaties, conventions, or agreements, the City exempts from municipal taxes, license fees, etc., the permanent principal consular officers of such foreign countries stationed in this City, who are not citizens of the United States and not engaged in any profession, business or trade in this City.

It is not disclosed to us by your communication whether there is in existence such a treaty, convention or agreement between the United States of America and the Republic of Poland.

Concerning the effect of the Act of Polish Parliament referred to, we are this day addressing the Department of State, Washington, D. C., for information and advice, upon receipt of which it is hoped we will be in a position to again write you more fully in response to your inquiry.

(SUPPLEMENTAL OPINION.)

Supplementing our letter to you of July 21, 1928, we take pleasure in sending you herewith copy of a communication from the Department of State upon the subject-matter of your inquiry of July 9, 1928.

It may be of interest to you to know that on March 10, 1928, the City Council of the City of Chicago passed the following ordinance:

“Be it ordained by the City Council of the City of Chicago:

Section 1. That authority be and the same is hereby granted to the Mayor to exempt from the payment of any license fee provided by any city ordinance, all foreign consuls or other authorized representatives of any foreign government, within the City of Chicago.

Section 2. This ordinance shall be in force and effect from and after its passage and approval.”

(No. 6247—July 31, 1928—G. F. M.)

DUTY DISABILITY BENEFITS, DOCTOR'S REPORT OR CERTIFICATE BY OSTEOPATH.

A duly licensed osteopath may sign a certificate stating the nature of the complaint of a municipal employee whom he has treated or is treating for the purpose of securing allowance on account of disability.

Retirement Board, Municipal Employees' Annuity and Benefit Fund:

Replying to your request for an opinion as to whether or not a doctor's report as to the disability of a municipal employee is acceptable when signed by an osteopath, the following is submitted:

The Act entitled “An Act to revise the law in relation to the practice of the treatment of human ailments for the better protection of the public health and to prescribe penalties for the violation hereof,” approved June 30,

1923, and known as the "Medical Practice Act," provides, among other things, "for the practice of any system or method of treating human ailments without the use of drugs or medicines and without operative surgery."

This provision includes the practice of osteopathy (*People v. Gordon*, 194 Ill. 560), and any osteopath who has been duly licensed by the State of Illinois to practice osteopathy has the same right and power as any other licensed physician to sign a certificate stating the nature of the complaint of the patient he has treated or is treating, or to sign a death certificate. *People v. Simon*, 278 Ill. 256.

I am of the opinion that a medical certificate signed by a duly licensed osteopath relating to the disability of a municipal employee must be accepted as the report of the attending physician, a licensed osteopath being entitled under the "Medical Practice Act" to the practice of "a system or method of treating human ailments without the use of drugs or medicines and without operative surgery."

(No. 6248—July 31, 1928—G. F. M.)

- 1 BOARD OF TRUSTEES, DEPUTY FIRE COMMISSIONER NOT A MEMBER, FIRE COMMISSIONER IS, FIREMEN'S PENSION.

The Fire Commissioner as the chief officer of the Fire Department is by statute made a member of the Board of Trustees of the Firemen's Pension Fund; and his duties as such member, being quasi-judicial, cannot be delegated by him or by the City Council to another.

- 2 BOARD OF TRUSTEES, FIREMEN'S PENSION FUND, DELEGATION OF POWER.

Members of the Board of Trustees of the Firemen's Pension Fund exercise quasi-judicial discretion in the administration of the Fund which discretion they cannot delegate to others.

- 3 MUNICIPAL CODE OF 1922.

Sections 1155 and 1195 of the Municipal Code of 1922, the one creating the office of Fire Commissioner investing power in him and the other prescribing the duties of the Secretary and Deputy Fire Commissioner, are limited to those matters over which the City Council has jurisdiction and said sections do not affect or control the membership of the Board of Trustees of the Firemen's Pension Fund.

Board of Trustees, Firemen's Pension Fund:

Replying to your request for an opinion as to the right of the Deputy Fire Commissioner to act as a member of your Board and vote upon matters coming before your Honorable Body for decision in the absence of the Fire Commissioner, the following is submitted:

The Firemen's Pension Fund Act of 1917 provides for the creation of a Firemen's Pension Fund and a Board of Trustees to administer said fund in cities having a population exceeding two hundred thousand (200,000) inhabitants. The section providing for the creation of a

Board of Trustees is section 3 of the Act and reads in part as follows:

“That in each such city there is hereby created a body, politic and corporate, under the name and style of ‘The Board of Trustees of the Firemen’s Pension Fund of the City of (name),’ which shall have exclusive control and management of the Firemen’s Pension Fund. Said Board shall be composed of the city treasurer, city clerk, marshal or chief officer of the Fire Department, and the comptroller or chief officer of the finance department of such city, and three (3) other persons who shall be chosen from the active firemen of such city, and one other person who shall be chosen from the firemen who have been duly retired under this Act.”

On May 24, 1924, there was passed by the City Council of the City of Chicago a certain Ordinance amending article 1 of chapter XXIX of the Chicago Municipal Code of 1922, and providing for the creation of the office of Fire Commissioner. The said amendatory ordinance contains the following provisions:

“1155—There is hereby created the office of Fire Commissioner who shall be the head of the Fire Department and shall have the management and control of all matters and things pertaining thereto in the manner herein provided.”

On May 2, 1927, there was passed by the City Council of the City of Chicago an amendatory ordinance amending article IV of chapter XXIX of the Chicago Municipal Code of 1922, to read as follows:

“1195—It shall be the duty of the Secretary and Deputy Fire Commissioner to preserve and keep all books and papers belonging to said Department, or which are required by law to be filed therein. He shall deliver to the City Council and to the respective departments all written communications from the Fire Commissioner and shall perform such other services as may be required by the ordinances of the City.

He shall have authority under and subject to the order, direction and control of the Fire Commissioner to sign or act for the Fire Commissioner, and shall perform such duties as may be required of him by said Fire Commissioner."

It is evident from the first above quoted Ordinance that the Fire Commissioner of the City of Chicago is the Chief Officer of the Fire Department, and is therefore, *ex officio*, a member of the Board of Trustees of the Firemen's Pension Fund.

It is apparent from the second above quoted Ordinance that the Deputy Fire Commissioner has power to act for the Fire Commissioner under and subject to the order, direction and control of the Fire Commissioner; but this power is necessarily limited to those matters over which the City Council has jurisdiction.

The Firemen's Pension Fund is created by Legislature and the membership of its Board of Trustees is specifically designated by legislative enactment. The City Council of the City of Chicago has no jurisdiction over the management or control of the Firemen's Pension Fund, but has control only over the several departments and the legislative business of the City of Chicago. The Legislature having designated the Chief Officer of the Fire Department to be a member of the Board of Trustees, it is not within the power of the City Council of the City of Chicago to designate any other officer of the Fire Department to act as such member by vesting in such other person authority to act for the Fire Commissioner under the direction of such latter officer.

As to the right of the Fire Commissioner, or any member of your Honorable Body, to delegate some person to act for him and in his name, place and stead at a meeting of your Honorable Body, the law renders such delegation

of power nugatory for the reason that judicial power cannot be delegated, and the Supreme Court of Illinois has held that a Board of Trustees, in passing upon the right of a beneficiary to participate in a pension fund, exercises *quasi-judicial* powers. *Eddy v. People*, 218 Ill. 611-616.

The granting of pensions to City firemen is a matter in which the public has an interest, since the pension fund exists as something established for the public benefit, i. e., to promote long continued and faithful public service. (*People v. Abbott*, 274 Ill. 380.) The duty to exercise the statutory powers of judgment and discretion in pension matters conferred upon a trustee of the Firemen's Pension Fund is a personal one, since the statute creating the Board of Trustees gives to the trustees no authority to delegate the *quasi-judicial* powers vested in them. When the law imposes a personal duty upon an officer in relation to a matter of public interest, he cannot delegate it to others. *Mann v. Richardson*, 66 Ill. 481, 484.

I am of the opinion that no member of the Board of Trustees of the Firemen's Pension Fund has the right, power or authority to delegate any other person to act in his name, place and stead as a member of your Honorable Body in the transaction of the business of the Board or in any matters calling for the exercise of judgment or discretion on the part of the members of the Board of Trustees, and that the Deputy Fire Commissioner cannot function as a member of your Board in the absence of or by direction of the Fire Commissioner.

(No. 6249—August 3, 1928—F. J. C.)

1 CONTRACTS, FAILURE TO COMPLETE, COMMISSIONER OF PUBLIC WORKS.

In case a contractor fails to properly perform his contract, the Commissioner of Public Works under a provision in a contract reserving to him the right to determine whether the contract is or is not fully performed, has a right to have the contract completed or to have remedied defects which have developed on account of the improper performance of the contract and charge the expense thereof against any balance due the contractor or to sue for the amount so expended.

2 CONTRACTS, DEFAULT, PROVISION IN CASE OF.

A provision in a contract with a municipality reserving to it the right to complete the contract in case the contractor fails to perform it satisfactorily is binding upon the contractor and enforceable.

Hon. Richard W. Wolfe, Commissioner of Public Works:

We have your letter of recent date requesting an opinion concerning contracts entered into between the City and Joseph L. Connelly. These contracts were dated respectively October 16, 1926, and September 27, 1926, for the erection of fire truck houses located at 23 and 25 South Laffin street and 10400 Vincennes avenue. It appears that both of these buildings have been occupied by the Fire Department for approximately one year, but that they have not been finally accepted or approved, either by your Department or the Fire Department owing to certain defects in their construction, and also to the fact that various items of faulty construction have developed since their occupancy. It further appears that demands have been made upon Mr. Connelly to remedy these defects, but no satisfactory results have been obtained with reference to same.

You ask us for an opinion as to the rights of the City to have the work on these buildings completed, and to remedy the defects in the construction which have developed since their occupancy, and if, in the doing of the work to remedy these defects, can the expense of such work be charged against the unpaid balances of the contract prices. It appears that there is an unpaid balance of \$3,402 on the Laffin street fire truck house, and a balance of \$3,905 on the Vincennes avenue truck house.

We have examined the form of contract signed by Mr. Connelly and from such examination we have found that there is contained in such contract the following provision:

“The said City of Chicago hereby reserves to said Commissioner the right to decide all questions arising as to the proper performance of this contract, and, in case of failure by the party of the first part to comply with this contract in any manner, then to declare the same forfeited, either as to a portion or the whole thereof, to relet the same with or without further advertisement; and in case of default, or in any case of default, to adjust the difference of damage or price, if any, which according to the just and reasonable interpretation of this contract, the said contractor should, in the opinion of said Commissioner, pay to the City of Chicago.

“It is further understood and agreed that for any amount of damage or price determined by said Commissioner of Public Works to be paid to the City by said contractor for any such default, or for any money paid out by said City in consequence of any such default, there shall be applied in payment thereof a like amount of any money that may be due and owing to said contractor under or on account of this contract, so far as there may be any such money and the same shall be sufficient; and if there shall not be a sufficient amount retained from said contractor, then the amount to be paid to the City in consequence of such default shall be a just claim against said contractor, to be recovered at law in the name of the City in any court of competent jurisdiction.”

Under the terms and provisions of the contract, we are of the opinion that the Commissioner of Public Works has the right to have the work specified in said contract completed, in conformity with the terms provided in said contract, and that in the completion of said work, and remedying defects in construction, and in the purchasing of material, and furnishing of labor, the Commissioner of Public Works has the right to charge the expense thereof against any money in his hands, which is unpaid to the contractor, if, as a matter of fact, the said contractor has failed to perform said contract in accordance with the terms thereof, and with the specifications made a part thereof.

It is therefore our opinion that you may complete this contract, and charge the expense of such work performed, and material necessary to be purchased, to cover the default of the contractor under the contract, and that these expenses may be paid out of the unpaid balances remaining in your hands. If such balances are not sufficient to pay for the cost of the completion of the work, in accordance with the terms of the contract, then the City has a just and valid claim, in addition to the balance in its hands, for any sum of money necessarily expended in excess of that balance.

(No. 6250—August 4, 1928—J. W. B.)

1 FUNDS, TRANSFER FROM ONE COUNCIL COMMITTEE TO ANOTHER.

Under section 2a, article 7 of the Cities and Villages Act the City Council by a two-thirds' vote of all of its members may during the last half of the fiscal year transfer previously appropriated funds from one corporate purpose to another corporate object within a department or other separate agency or committee of the Municipal Government.

2 WORDS AND PHRASES.

The phrase "department or other separate agency" in section 2a, article 7 of the Cities and Villages Act includes the City Council and its Committees.

Hon. Louis E. Gosselin, Acting City Comptroller:

Replying to your communication of July 31, 1928, with reference to an ordinance passed by the City Council on July 11, 1928, transferring the sum of \$5,000 from Account 11-S-22, Committee on Harbors, Wharves and Bridges, to Account 15-S, Committee on Efficiency, Economy and Rehabilitation, we beg leave to advise you that under the Statutes of the State of Illinois the City Council has the power during the last half of the year, by a two-thirds' vote of all the members of said body, to make transfers within the department or other separate agency of the Municipal Government of sums of money appropriated for one corporate object or purpose to another corporate object or purpose.

This department has ruled that the City Council falls within the phrase "department or other separate agency," and that it possesses the right to make transfers from one Council committee to another.

The ordinance of July 11th, making such transfer, is therefore valid.

(No. 6251—August 4, 1928—F. J. C.)

1 SEWERS, CONNECTION IN ANNEXED TERRITORY,
JURISDICTION.

The City has no power or jurisdiction over a sewer which was laid in territory previous to its annexation to the City for private purposes and which sewer in part extends beyond the limits of the City.

2 SEWERS, PUBLIC AND PRIVATE.

A sewer does not necessarily have to be a public sewer but it may be a private sewer, as where the sewer is built by private persons, corporations or associations for their individual use, the sewer is private and not public.

3 ANNEXED TERRITORY, ORDINANCES IN FORCE.

Ordinances in force at the time territory becomes annexed to a city apply without further legislation to such territory.

Hon. Richard W. Wolfe, Commissioner of Public Works:

Replying to your letter of recent date in relation to permits issued by your department to allow the connection of certain house drains with a sewer in Irving Park boulevard, we desire to say:

It appears that the City issued certain permits to Louis Scully, a sewer contractor, doing work for Feuerborn & Klode, subdividers, in the vicinity of Thatcher avenue and Irving Park boulevard. The City has annexed an area lying west of Harlem avenue and north and south of Addison street, and that by virtue of this annexation all of Irving Park boulevard lying between the center line of Thatcher avenue and the center line of Cumberland avenue is now within the limits of the City of Chicago.

It further appears that there is a sewer extending from an outfall in the Desplaines River, west of the City lim-

its, and running into the grounds of the Acacia Cemetery, east of the City limits, the outfall and cemetery both being outside the City limits.

You state it has been the position of the Bureau of Sewers for many years to consider any sewer, lying in a public highway, as a public sewer and that the City is responsible for its maintenance and that permits may be issued for connections with it in accordance with the City Ordinances and that the department has taken a position to the effect that the part of the sewer in question in Irving Park boulevard within the City limits is a public sewer within the jurisdiction of the department.

It is claimed by the Acacia Cemetery that the sewer in Irving Park boulevard was built by it prior to annexation. That the Cemetery at its own expense under permission of the proper authorities built the sewer in question. The Cemetery now claims that the City is without any right to issue permits for connections with the sewer.

It also appears that on July 20th last a permit was granted to Mr. Scully to make connections with this sewer and that he began work under the permit on July 23d. The Cemetery immediately filed objections to the work proceeding and on July 23, 1928, the permits that had been issued were revoked.

The question you ask is whether or not the sewer in Irving Park boulevard within the City limits is a public sewer to which connections may be made by authority of the City of Chicago.

From the facts as stated in your letter and the information in the sketch attached to it we can assume that the sewer in question was installed and built prior to the annexation of the territory here involved. We can assume that all of the ordinances of the City of Chicago are

in force in so far as the territory annexed is concerned, because of the rule of law laid down in the case of *McGurn v. Board of Education*, 133 Ill. 122, where the court said, at page 131:

“By becoming a part of the municipality it (that is to say, annexed territory) is *ipso facto* brought under and made subject to all the laws by which the municipality itself is governed. Those laws extend over and apply to it *ex proprio vigore* and do not require express legislative action to give them such application. Here the instant the territory in question became annexed to Chicago, it became a constituent part of the city, and from that instant became subject to the same laws, the same municipal organization, and the same policy which the statutes in force had already provided for the government of the city and its institutions.”

In *People ex rel. City v. Chicago Telephone Company*, 220 Ill. 238, the court said, at page 249:

“The ordinances of the city extended over the annexed territory immediately upon annexation (*Illinois Central Railroad Co. v. City of Chicago*, 176 U. S. 646), and the limitations of the ordinance applied to the annexed territory. The question in this case is the same as the one involved in the case of *Indiana Railway Co. v. Hoffman*, 160 Ind. 601 (69 N. E. 399), where it was held that a provision for transfers applied to the territory annexed to the city after the contract was made, and on an interurban line on which the defendant had been entitled to charge an additional fare before the annexation of the territory.”

It will be noted however that this sewer extends to points east and west of the City limits and beyond the territory over which the City has jurisdiction. There can be no doubt but that the City would have a right within certain limitations to find an outlet for its sewers outside the City limits, but in this case the sewer was built before annexation and was not at that time any part of the City's system of sewers.

It is a well settled rule of law that a city, in establishing a system of sewers, exercises a certain discretion and it is for the corporate authorities to determine the necessity or lack of necessity for the building of sewers in a given locality. In reference to this rule McQuillin on Municipal Corporation says:

“The establishment of sewers and drains by a municipal corporation is the exercise of a legislative or quasi-judicial power, and the legislative body of the municipality is the sole judge of the necessity therefor. At common law, a municipal corporation is under no obligation to provide drainage or sewerage for its inhabitants, unless rendered necessary by its own act, and its omission to do so will not render it liable in damages. And the fact that it constructs sewers in a portion of a sewer district will not render it liable for not constructing them throughout the entire district at the same time. So the fact that a municipality has adopted a plan of sewerage does not make it liable in damages arising from its failure to execute part of the plan, since the municipality, in such case, is at liberty to carry out the plan in whole or in part at such times as it sees fit. For the same reason, a municipal corporation will not be held liable for omitting or refusing to reconstruct its drainage system to take in outlying property added to the corporation.” McQuillin Mun. Corp., 2d Ed., sec. 2864 (2691), pages 915-16.

In *Chicago v. Rustin*, 99 Ill. App. 50, it said:

“Conceding that the city had power to construct a sewer in the alley, it does not appear from the evidence that it ever attempted to exercise that power, and a municipal corporation is not liable for the non-exercise of a charter power. It is only when a municipality assumes to exercise a granted power, and exercises it negligently, that it is liable. *Freeport v. Isbell*, 83 Ill. 440; *Goodrich v. City of Chicago*, 20 Ib. 445; *City of Chicago v. Hogan*, 59 Ill. App. 446; 2 Dillon on Mun. Corp., Sec. 1010.”

In this instance the sewer in question was not built by the City nor is the City bound to use the particular sewer and as a matter of fact would have a right to build another sewer within the territory in the City of Chicago which has been annexed regardless of the fact that there is a privately owned sewer in the street.

As to whether or not there can be a privately owned sewer we think that question has been answered in the affirmative by McQuillin in his work, where it is said:

“Private sewers are usually defined to be those built with or without permits, paid for by the persons, associations or corporations constructing the same. They are those constructed by and for the use of a private individual or corporation. They may connect with other sewers. An ordinance may authorize private individuals to construct a sewer and provide that any person desiring to connect with such sewer may do so on paying his proportionate share of the cost. The owner of a private drain is not estopped from denying that it is a public drain where it was constructed by him solely for his own benefit and he never consented to have it used for public sewage purposes. But where he plats his land, constructs sewers in the streets, and sells lots with easements in the sewers, he thereby parts with control over the sewers, although still retaining technical ownership of the soil in the street.” McQuillin Mun. Corp., 2d Ed., sec. 1544, pages 302, 303.

The question in another form was discussed by Mr. Hornstein of this office in an opinion (Opinions of Corporation Counsel, 1923-4, page 315) to a former Commissioner of Public Works. The question there involved was the advisability of allowing the connection of outside drainage with the sewers of the City. In that opinion the danger was pointed out that in case of overflow the City would be liable for damages.

It is apparent from the conditions involved herein that there is a grave question as to the right of the City to

make a sewer connection with the sewer in Irving Park boulevard, but in addition thereto the making of such connection, even though only temporary in character, would render the City liable to any damage which might accrue to owners of property abutting the sewer who may own property outside the City.

We therefore advise you that it would be unwise to issue permits for connections with that part of the sewers located in the City.

(No. 6252—August 8, 1928—E. C. H., F. J. V.)

1 SUBWAY, PRELIMINARY WORK, ORDINANCE OF 1928
INVALID.

The Ordinance of July 11, 1928, which attempts to transfer \$647,928.60 from the Traction Fund into a separate account to be expended for surveys, preliminary design, preparation of ordinance plans and estimates for the construction of a transportation subway is invalid because not passed as an amendment to the Annual Appropriation Ordinance of 1928 within the proper time.

2 SUBWAYS, PRELIMINARY WORK, RESOLUTION.

The resolution of March 10, 1928, authorizes the Board of Local Improvements to make investigations and perform preliminary work regarding construction of a transportation subway. (Note: This resolution is of doubtful validity in view of the invalidity of the ordinance upon which the resolution is based and the present enabling act which requires an ordinance in place of a resolution.)

3 ANNUAL APPROPRIATION ORDINANCE, AMENDMENT.

The power to amend an annual appropriation ordinance can be exercised only at the next regular meeting of the City Council occurring not less than five days after the passage of the ordinance.

4 ANNUAL APPROPRIATION ORDINANCE, CONDITIONS,
TRANSFER.

A fund appropriated in the Annual Appropriation Ordinance conditionally cannot be transferred to and expended for another corporate purpose or object free from the condition under which it was originally appropriated except at the time when an amendment of such an ordinance is permissible.

5 SUBWAYS, CONSTRUCTION OF, APPROPRIATION.

The Annual Appropriation Ordinance of 1928 appropriated \$2,500,000 from the Traction Fund for the construction of a transportation subway to be used only upon the passage and approval by the people of an ordinance directing the making of a subway.

6 SUBWAYS, CONSTRUCTION OF, TRACTION FUND.

The City Council has no power to divert the special Traction Fund created by the accumulation of 55 per cent of the net earnings of the Chicago City Railways Company and the Chicago Railways Company to general corporate purposes, but this fund with other available funds not otherwise appropriated may be used, in whole or in part, for the purpose of acquiring or constructing a transportation subway including preliminary work in the way of conducting an investigation and securing a report of expert engineers and others as to the desirability of constructing or acquiring such subway.

Hon. Wm. Hale Thompson, Mayor:

In compliance with your request we submit the following opinion as to the validity of an ordinance passed by the City Council at a meeting held July 11, 1928, purporting to authorize the transfer of the sum of \$647,928.60 from Account 304-X, in the Annual Appropriation Ordinance of 1928, to Account 304-X-1 for the purpose of providing funds for the expense of surveys, preliminary design, preparation of ordinance plans, and estimates for the construction of a transportation subway. In our consideration of this matter, we have been guided solely by

the legal question presented and the legal principles involved, and have given no consideration whatever to questions of policy.

In the first place, it may be stated that the City Council has the power to appropriate and expend what is known as the "Traction Fund," or any part thereof, for the construction of subways in the City of Chicago. This was clearly settled by our Supreme Court in the case of *Barsaloux v. City of Chicago*, 245 Ill. 598, in which the court said, at page 611:

"The only remaining question requiring consideration is whether the city may use the special traction fund for the purpose of acquiring or constructing subways. Section 24 of the traction ordinance provides that the city shall deposit fifty-five per cent of the net earnings of the traction companies to the credit of a separate fund, to be kept and used for the purpose and construction of street railways by said city. Under this ordinance clearly the city would have no power to divert this fund to general corporate purposes, but using it to construct subways is not a diversion of such fund. The construction of subways is the construction of street railways, and is therefore the identical purpose for which such fund may be used. The city is not, however, limited to the use of this fund, alone, for such purpose. Any available funds not otherwise appropriated in the city treasury may properly be applied to the construction or purchase of subways."

In the exercise of the power thus vested in it the City Council, in the Annual Appropriation Ordinance for the year 1928, under Account 304-X appropriated \$2,500,000

"for the construction of subways, to be paid from the deposits of the Chicago City Railway Company and the deposits of the Chicago Railways Company into the Traction Fund, in equal amounts from both deposits; to be expended by the officer or officers now or hereafter authorized by law, to order, contract for and control the work of construction. No amount

shall be expended, nor any expense or liability incurred hereunder, until after the passage by the City Council and approval by the voters by a referendum vote of an ordinance directing the making of such improvement."

The ordinance passed by the City Council at a meeting held July 11, 1928, and the validity of which is the question submitted to us for an opinion, provides as follows:

"Section 1. That the City Comptroller and the City Treasurer be and they are hereby authorized to transfer the sum of Six Hundred Forty-seven Thousand, Nine Hundred Twenty-eight and 50/100 Dollars (\$647,928.50) from Account 304-X, Appropriations 1928 from the Traction Fund (deposits of the Chicago City Railway Company and the Chicago Railways Company), to Account 304-X-1, Traction Fund, for the purpose of expense of surveys, preliminary design, preparation of ordinance plans, and estimates, for a transportation subway as per resolution passed by the City Council on March 10, 1928. (Council Journal, pages 2395-2396.)

"Section 2. That the Board of Local Improvements be and it is hereby authorized to proceed with the surveys and preliminary design, preparation of ordinance plans and estimates for a transportation subway as per resolution passed by the City Council on March 10, 1928 (Council Journal, pages 2395-6), and the communication from the Board of Local Improvements dated June 19, 1928, and to expend the following amounts from Account 304-X-1, appropriations heretofore made from the Traction Fund (deposits of the Chicago City Railways Company and the deposits of the Chicago Railways Company)—Council Journal of January 9, 1928, page 1867."

Then follows in section 2 a set-up of certain positions and annual salaries attached to the same, together with provisions for certain supplies and equipment to be secured at expenditures therein specified.

Section 3 of the ordinance authorizes the Comptroller and the City Treasurer to pass for payment vouchers for

expense authorized by said ordinance, when properly approved by the Board of Local Improvements.

The resolution passed by the City Council on March 10, 1928, referred to in said ordinance, is as follows:

“WHEREAS, The Committee on Local Transportation is working on a Bill for enabling legislation for the construction of subways; and

“WHEREAS, A great amount of time can be saved at this time by allowing the Board of Local Improvements to begin the preliminary work necessary to the preparation of an ordinance for the construction of subways; and

“WHEREAS, It is the sense of the Committee on Local Transportation that authority be given to the Board of Local Improvements at this time to start preliminary work on subway construction; therefore be it

“RESOLVED, That the City Council of the City of Chicago hereby authorizes the Board of Local Improvements to prepare ordinances for the construction of one north-and-south subway and one east-and-west subway after proper public hearings, in any section of the city where property-owners are willing to pay for a portion of the cost of subways by special assessments.”

While said Ordinance of July 11, 1928, providing for the transfer of the funds in question, does not in direct terms authorize the creation of a new account to be known as Account 304-X-1, it is clear that the City Council intended such an account to be opened and established by the City Comptroller, as the City Comptroller, under section 3, of the Annual Appropriation Ordinance for the year 1928, would, it appears, have sufficient authority to open such an account.

The fundamental question, however, is as to the power of the City Council, by its Ordinance of July 11, 1928, to transfer the sum of \$647,928.60 out of the \$2,500,000

appropriated from the "Traction Fund" for construction of subways, as provided in the Annual Appropriation Ordinance, and to authorize the expenditure of said sum, so transferred, for surveys, preliminary design, preparation of ordinance plans, and estimates, for a transportation subway, free from the condition and restriction contained in the Annual Appropriation Ordinance that no expenditure shall be made from said \$2,500,000, so appropriated, without the "approval by the voters by a referendum vote of an ordinance directing the making of such improvement." After careful consideration we believe that the City Council is not vested with such power, and that the ordinance of July 11, 1928, purporting to make such transfer is void.

The preliminary work "for a transportation subway," authorized by the Ordinance of July 11, 1928, is necessarily incident to and a part of the construction of subways and is included in the appropriation of \$2,500,000 under Account 304-X, as contained in the Annual Appropriation Ordinance for the year 1928. As said by our Supreme Court in *Barsaloux v. City of Chicago*, 245 Ill. 598, at page 612:

"The power to construct *necessarily includes the power* to take the preliminary steps contemplated by the appropriation ordinance in question."

In that case the Appropriation Ordinance provided merely for preliminary work in the way of conducting an investigation into and securing a report of expert engineers and others as to the desirability of constructing subways, and the court in holding that the "Traction Fund" could be used for the construction of subways said that the preliminary work provided for in the Appropriation Ordinance to be paid out of the "Traction Fund" was a part of the construction of the subways, and therefore properly chargeable against the "Traction Fund."

At the time of the passage of the ordinance in question, on July 11, 1928, the City Council did not possess the power to amend the Annual Appropriation Ordinance as such ordinance was amendable only at the next regular meeting of the City Council, occurring not less than five days after the passage thereof (Cities and Villages Act, ch. 24, art. VII, sec. 2, Cahill's Statutes, 1927), and the only statute under which it could be claimed that the City Council possessed the legal authority to make the transfer in question is section 2a of article VII of chapter 24, Cahill's Statutes, 1927, which is as follows:

"The City Council of cities, and board (s) of trustees in villages having a population of 100,000 or more, shall, at any time after the first half of each fiscal year, have power, by a two-thirds vote of all the members of such body, to make transfers within the department or other separate agency of the municipal government, of sums of money appropriated for one corporate object or purpose to another corporate object or purpose."

It is quite manifest, however, that if the preliminary work in question is necessarily included in the construction of subways, as stated by our Supreme Court, and such item is within the terms of the Annual Appropriation Ordinance, it is an integral part of the corporate purpose for which the \$2,500,000 was appropriated, and therefore can not be taken out of the Annual Appropriation Ordinance and treated as "another corporate object or purpose" for which a part of the \$2,500,000 could be transferred to another Account free from the conditions imposed by the Annual Appropriation Ordinance. At the time of the passage of the Annual Appropriation Ordinance, the City Council had the power to exempt the preliminary work in question from the condition requiring a referendum, but this was not done. On the contrary, under the terms of the ordinance *no amount* of the \$2,500,-

000 thus appropriated was to be expended except upon the approval of the voters by a referendum vote. This necessarily included the \$647,928.60 subsequently transferred to the new Account and authorized to be expended for such preliminary work in the construction of subways. The preliminary work in question being necessarily included in, and a part of the general scheme of the construction of subways, the action of the City Council in creating Account 304-X-1 and transferring to it from Account 304-X the sum of \$647,928.60, is nothing more than a mere splitting of the fund to be applied to respective parts of the same corporate object or purpose.

Were this ingenious method permitted there would be nothing in the way to prevent subsequent withdrawals and transfers from the original fund so appropriated to be applied to different parts of the same corporate object or purpose, until nothing would be left of the original appropriation, and the condition imposed by the Annual Appropriation Ordinance would thereby be nullified and, in effect, repealed in violation of the statute which prohibits amendments to the Annual Appropriation Ordinance after the meeting of the City Council next succeeding the meeting at which such ordinance was passed.

Indeed, we do not believe that even in the case where the corporate objects or purposes are clearly different, a fund appropriated conditionally can be transferred to and expended for another corporate object or purpose free from the condition under which it was originally appropriated. Such an appropriation is not an absolute and unqualified one, but by its terms the money so appropriated is to be used and expended only upon the fulfillment of a condition, and until that condition is fulfilled there is no legal right to expend the money for any purpose whatsoever. It is only after the condition has been per-

formed that the fund assumes the character of an absolute appropriation that may be transferred under the statute to another account for "another corporate object or purpose." A subsequent ordinance transferring such a fund, or any part thereof, to another account to be expended, free from the condition imposed, would not only change the character of the fund but would nullify the motive and intent of the appropriation and amount to a repeal of the appropriation ordinance itself. This could not be done, as we have before stated, unless such ordinance was passed "at the next regular meeting of the City Council * * * occurring not less than five days after the passage" of the Annual Appropriation Ordinance.

For the reasons stated herein, we are of the opinion that the ordinance passed by the City Council on July 11, 1928, transferring the sum of \$647,928.60 from Account 304-X to Account 304-X-1 is invalid under the law.

(No. 6253—August 13, 1928—J. W. B.)

PUBLIC PROPERTY, TEMPORARY STRUCTURES, PERMIT.

In case of the erection of temporary structures on public property in the City of Chicago it is the duty of the Commissioner of Public Works under sections 3212 and 3221 of the Municipal Code of 1922 to issue the permits upon application made for that purpose. In case of permanent structures, the City Council alone has power to give consent.

Hon. Richard W. Wolfe, Commissioner of Public Works:

We beg leave to acknowledge receipt of your oral request for an opinion as to your power and authority to

issue a permit to the Chicago Real Estate Board, a corporation, and to the Own Your Own Home Exhibition, a corporation, to use and erect buildings on certain public property described in said permit, and in reply, we beg to advise you that section 3212 of the Chicago Municipal Code of 1922 provides, in part, that it shall be the duty of the Commissioner of Public Works, subject to the provisions thereof, and the ordinances of the City, to take special charge and superintendence of all streets, alleys and highways in the City, and of all walks and crosswalks, bridges and docks, wharves and public places and public grounds in said City. We also beg to inform you that section 3221 of the Chicago Municipal Code of 1922 provides that, in all cases where provision is made by ordinance that the consent of the Commissioner of Public Works shall be obtained to authorize an act to be done, he may grant a permit therefor, subject to the restrictions of the ordinances in relation thereto.

You are charged by law with the superintendence, management, control and regulation of all the public grounds of the City, and where a person, firm or corporation desires to erect temporary structures on any City property they are prohibited from doing so unless they make application to you, as Commissioner of Public Works and as custodian of such property, for a permit to do so.

You have no power to issue any permit for the erection of permanent structures without the consent of the City Council.

The permit in question is temporary in its character, and it is expressly provided that it may be terminated at any time by the Mayor or the City Council, and is not to continue in any event for any period except from April 1, 1929, to May 31, 1929. If, in your discretion, you deem

it advisable to issue such a permit, the power to do so is conferred upon you by the sections of the Municipal Code that we have referred to in this opinion.

(No. 6254—August 15, 1928—F. J. V.)

1 CIVIL SERVICE, ELIGIBLE LIST, CERTIFICATION TO DIFFERENT DEPARTMENTS.

The Civil Service Commission has no power to make separate eligible lists of those who were successful candidates in a single examination for a specific office, unless one examination is called to fill the same class of positions or places in separate departments; in which case there can be certification from such eligible list according to seniority separately to such departments or to any one of them. Thus under an examination called for quarantine officers in the Department of Health and in the Municipal Tuberculosis Sanitarium, certification may be made from a single eligible list to either or both of the departments where the appropriation is not specific but general for all quarantine officers.

2 CIVIL SERVICE, MERGER OF POSITIONS, CERTIFICATION.

Upon the merger of two positions or places in the Civil Service of the City into one position, those eligible to the former position are entitled under section 3, rule 9 of the Civil Service Rules to certification according to seniority to the same branch, class, grade or rank of service.

Hon. Arnold H. Kegel, Commissioner of Health:

We have your request of the 8th instant for an opinion upon a statement of facts substantially as follows:

In 1918 the Municipal Tuberculosis Sanitarium made requisition for quarantine officers to work under the supervision of the Department of Health. "To provide for

these positions and other vacancies existing in the Department of Health, the Civil Service Commission held an examination at that time for quarantine officers. Certifications were made to both the Department of Health and the Municipal Tuberculosis Sanitarium from the resulting list. Subsequent to this time the Civil Service Commission entered an order in its minutes providing that when quarantine officers who had been on sick leave or leave of absence were returned to the eligible list for reinstatement they should be maintained on separate lists for both the Department of Health and the Municipal Tuberculosis Sanitarium. Such lists exist today.”

The City Council in its Annual Appropriation Ordinance for the year 1927 made no specific appropriation for quarantine officers to be specially assigned to the Municipal Tuberculosis Sanitarium, but made appropriation generally for all quarantine officers. The question which you submit is whether or not these quarantine officers whose names continue to appear on the list of those assigned to service in the Municipal Tuberculosis Sanitarium by order of the Civil Service Commission are now eligible and entitled to certification and appointment to the regular work of the quarantine officers in the Department of Health.

This question must be answered in the affirmative. So long as those quarantine officers were assigned to the Municipal Tuberculosis Sanitarium, and this special work continued in that institution, it probably was within the power of the Civil Service Commission at the time to divide the original civil service eligible list of these quarantine officers into those serving the Municipal Tuberculosis Sanitarium and those connected directly with the Department of Health. It was not otherwise within the power of the Civil Service Commission to make separate lists of those quarantine officers who qualified under the

one civil service examination. It is our opinion, therefore, that when assignments of these quarantine officers to the Municipal Tuberculosis Sanitarium were discontinued, and particularly when the City Council failed to make specific appropriations for such special assignment to this institution, that the two lists automatically merged and immediately gave to all quarantine officers in the service of the Municipal Tuberculosis Sanitarium the same right to certification and appointment from the original and the merged lists to the position of quarantine officers in the Department of Health itself.

Not only were such quarantine officers entitled to certification and appointment from the original eligible list on which they were placed after their qualifying examination, because it was beyond the power of the Civil Service Commission to deprive them of the civil service status which they had acquired, but they are entitled to such certification and appointment along with the other quarantine officers also certified from said original list directly to the Department of Health, by virtue of section 3 of rule 9 of the rules of the Civil Service Commission, which section is as follows:

“When any officer or employe has returned from a leave of absence and his position in the meantime has been filled by certification, or when any officer or employe has been laid off in accordance with the preceding section, or when the position of any officer or employe has been abolished, such officer or employe shall have precedence to reinstatement in a position of the same branch, class, grade or rank and character of work and approximate pay, according to his seniority of certification.”

By the plain terms of this rule of the Commission the quarantine officers who were assigned to work in the Municipal Tuberculosis Sanitarium under the supervision of the Department of Health, by reason of the abolition

of this position and the creation of such positions in the Department of Health alone, are now entitled to precedence in reinstatement to the position of quarantine officers under the Department of Health, according to seniority of certification. For reasons already stated there can now exist in this situation but one regular legal civil service eligible list of quarantine officers and this must include such officers as have heretofore served the Municipal Tuberculosis Sanitarium. And the certifications for appointment from this list must be made with due regard to the seniority in the service of those on the list regardless of whether they served in the Municipal Tuberculosis Sanitarium or in the Department of Health itself.

As suggested in your communication, a copy of our opinion will be submitted to the Civil Service Commission for their consideration and guidance.

(No. 6255—August 16, 1928—L. H.)

1 MOTION PICTURES, CENSOR BOARD, MANDAMUS, DENIAL.

The denial by a court of a mandamus against the Moving Picture Censor Board which has found objectionable matter in a proposed motion picture is in effect an affirmance or approval of the action of the Board and leaves the Board free to thereafter grant a permit upon the removal from the picture of the objectionable features.

2 MOTION PICTURES, REGULATION, PERMIT.

It is within the police power of the City Council to regulate the exhibition of motion pictures, which regulation is in the form of the granting of permits under sections 2785 to 2794 of the Municipal Code of 1922.

3 MUNICIPAL CODE OF 1922.

Sections 2785 to 2794 of the Municipal Code of 1922 are valid.

Mrs. Anna M. Costello, Moving Picture Censor Board:

We have your letter in which you inquire as to the legality of issuing a permit for the presentation of a motion picture entitled "Dressed to Kill," for which an application had previously been rejected, but which now is corrected so that it is no longer objectionable.

It appears that when application for a permit was made in the first instance the permit was refused by the Censor Board on account of certain objectionable features which you ordered cut out. The motion picture producers thereupon sought to compel the issuance of a permit by instituting proceedings for mandamus. The writ of mandamus was denied by Judge Feinberg. Had the writ been granted the Commissioner of Police would have been compelled to issue a permit for the exhibition of the picture just as it was when first presented to the Censor Board.

The writ having been refused, however, all that the decision of the court amounts to is that it sustained the action of the Censor Board in rejecting the application for a permit for the picture in the condition that it was at the time the application for a permit was made. The court's decision does not forbid you from issuing a permit if the picture has been altered so as to overcome the objections which the Censor Board pointed out and required the producer to eliminate.

The exhibition of motion pictures is a business subject to police regulation. Therefore, it is within the power of the City Council, to provide, by ordinance, for the exercise or discretion on the part of the officers of the City in the issuance of permits. This the Council has done, by the enactment of sections 2785 to 2794, inclusive, of the Chicago Municipal Code of 1922.

That such provisions are valid may be gathered from the decision of the Appellate Court in the case of *Vita-graph Co. v. City of Chicago*, 209 Ill. App. 591. The court there said, among other things:

“We think the fundamental error in the theory of the bill is that the refusal of the license or permit deprived complainant of a personal or property right. The business is conceded to be one subject to police regulation. In such a case ‘the refusal to license deprives no man of any personal or property right, but merely deprives him of a privilege which it is within the discretion of the municipal authorities to grant or withhold.’ *People v. Cregier*, 138 Ill. 401, 419.”

Under the sections of the Code above mentioned the practice has been to allow a permit to issue when cut-outs ordered by the Censor Board have been made. This is clearly within the power of the Board, and the mere fact that a permit was refused before the cut-outs were made does not preclude the Board from issuing a permit after

they are made. The objection to the picture may have consisted of only one thing, which, when eliminated, left the picture entirely free from fault. In fact, if a second application for a permit is made after all cut-outs ordered by the Board have been complied with, it is quite possible that the refusal of a permit on such second application may furnish a ground for the issuance of a writ of mandamus even though the court may have held that the rejection of the first application for a permit was proper.

We, therefore, beg to advise you that there is no order of court which enjoins the Commissioner of Police from issuing a permit for the picture known as "Dressed to Kill," and that if the cut-outs ordered by the Censor Board have been made and the picture is now satisfactory to the Board, a permit for the exhibition of same may lawfully be issued.

(No. 6256—August 18, 1928—L. H.)

1 DONATIONS, CITY COUNCIL IS WITHOUT POWER TO MAKE.

Donations or contributions by the City Council to private associations or corporations for the purpose of securing an apportionment of the State are unauthorized and invalid.

2 WORDS AND PHRASES, CORPORATE PURPOSE, APPORTIONMENT OF STATE NOT.

The proper apportionment of the State is not a municipal or corporate purpose under present City charter for which an appropriation or donation can lawfully be made.

Hon. John S. Clark, Chairman, Committee on Finance:

You state that the Committee on Finance has a request from the Constitutional Apportionment Legion—John

Fergus, President—asking that the City of Chicago contribute \$5,000 toward the expenditure of the Legion in its fight to reapportion the State of Illinois. You ask for an opinion as to the right of the City to contribute to this campaign, which you regard as a “necessary and worthy cause.”

Questions relating to the propriety of contributing money for the purpose of securing a reapportionment of the State have come up several times. We have always held that the City had no legal right to do so. An opinion was written on the subject in the Law Department which appears under date of January 27, 1926, in the printed volume of Opinions for 1925-1926 at page 534.

While the question answered in the opinion just referred to was somewhat different from the one you ask, because it involved the right of the City to advance funds to an organization on the promise of reimbursement, nevertheless the question you ask was covered in the reply.

In that opinion the Corporation Counsel wrote, among other things, as follows:

“While the proper apportionment of the State is of great consequence to the City as a municipality, it is not in a technical sense such a municipal purpose as the City would be authorized to appropriate funds for. It is more to be regarded as a matter concerning the people of the municipality than the municipality as a corporation. Such being the case, we would have to find some direct authority in the charter to expend money for such purposes. There are, of course, many activities of the City which are carried on for the individuals comprising the community as distinguished from the municipality, such as health measures, preservation of the peace, etc. But in each case there is express authority granted by the charter for such activity.”

The above excerpt undoubtedly states the law, and we are therefore constrained to hold that it would not be a

legal expenditure of the City's money to make the contribution proposed. It may be interesting for you to note, in this connection, that, notwithstanding the opinion that was rendered, the sum of \$10,000 was advanced by the City to the Chicago and Cook County Citizens' Committee for Popular Representation on the promise of the officers of this organization that reimbursement would be made. (See Council Journal of December 30, 1925, p. 2014.) This money has not been returned, and there is a possibility of personal liability on the part of the City's officers who advanced it in case we are unable to collect it.

The use of the Mayor's Contingent Fund for purposes which are not strictly speaking "corporate purposes," but which nevertheless may be regarded as necessary public expenditures, is permissible sometimes. This may be one of those occasions; but in giving an opinion on the subject we cannot take this into account, and must confine ourselves to the law that is unquestionably applicable thereto.

(No. 6257—August 20, 1928—L. H.)

PUBLIC DOCUMENTS, PAY CHECKS, PRODUCTION BEFORE GRAND JURY.

A public officer may decline to produce public papers such as pay checks upon the mere request of an attorney or upon subpoena to appear before the Grand Jury without *subpoena duces tecum* or an order of court, or an order of the City Council.

Hon. Louis E. Gosselin, Deputy Comptroller:

Your letter of recent date, concerning request for certain pay checks, to be used before the special grand jury, was referred to the undersigned for consideration and reply.

You state in your letter that a request was made by Charles Center Case, an attorney, through the Election Commissioners' office, for the pay checks of the judges and clerks of election of the 20th Ward at the election held February 22, 1927, to be used before the Special Grand Jury. You ask to be advised whether you should comply with the request.

It does not appear that there has been anything in the nature of an official demand made on you, either by means of a *subpoena duces tecum*, or an order of court, or by resolution of the Board of Election Commissioners or the City Council, or in any other way. Mr. Case holds no official position, so far as we are advised. Therefore, the request is merely that of an attorney seeking to secure some data or evidence in a matter which he is handling.

Such being the case, the propriety of complying with the request is purely a question of policy. You will incur no liability of any kind if you decline to produce the papers called for. This would be true even if a subpoena had issued commanding you to appear before the grand jury. Any person duly subpoenaed by process issued by the Clerk of the Court is bound to appear in person, but he cannot be required to produce books or papers except under a *subpoena duces tecum* issued by order of court.

In view of the fact that a great deal of loose gossip is being indulged in relative to the work of the special grand jury, we are of the opinion that it would be advisable to retain the documents in question in your possession unless a more authoritative demand is made on you. If any further request or demand is made it would be well to call on the Law Department for additional advice.

(No. 6258—August 24, 1928—L. H.)

1 FUNDS, STREET DECORATIONS FOR CONVENTIONS,
CITY COUNCIL.

A reasonable sum used for the decoration of certain streets of the City of Chicago in honor of visiting members of large organizations, such as the Elks, is a legitimate use of corporate money under clause 19 of section 1, article 5 of the Cities and Villages Act; but is an expenditure which must be authorized by the City Council.

2 CITIES AND VILLAGES ACT.

Clause 19, section 1, article 5 of the Cities and Villages Act impliedly confers power upon the City Council to provide for the decoration of certain streets of Chicago in honor of visitors.

3 WORDS AND PHRASES.

The word "regulate" in clause 19, section 1, article 5 of the Cities and Villages Act means that the flying of flags and banners across streets or houses may be permitted under proper regulation.

4 APPROPRIATIONS, 3-S-2 ACCOUNT.

This appropriation is for checking assessed valuations and cannot be used for street decoration expenses.

5 MAYOR'S CONTINGENT FUND, STREET DECORATIONS.

The expense of decorating certain streets in honor of large numbers of visitors may be paid out of the Mayor's Contingent Fund or Account 36-S-1 which was originated in a desire to provide means for official entertainment of distinguished visitors.

Hon. Louis E. Gosselin, Deputy Comptroller:

You submitted to us a bill for the sum of \$1,000 vouchered out of Appropriation Account "3-S-2," together with

copy of a letter from the Chairman of the Committee on Finance, in which he states that, pending council action, you may consider same as authority for paying said voucher and charging it to the account mentioned. The expense incurred is for rental of decorations for certain streets in honor of and for the purpose of extending the City's welcome to visiting members of the organization known as I. B. O. P. of Elks, which is about to hold its annual session or convention in the City at which there will be a large influx of visitors.

The question you ask is two-fold: First, whether the expenditure of City money for such a purpose is lawful; and, second, whether payment may legally be made out of the appropriation above designated.

In our opinion it is a legitimate use of corporate money to apply a reasonable sum to the purpose in question. It would require a very narrow construction of the powers of the City Council to say that it was not a proper expenditure of money to beautify the City's streets in honor of visitors. Clause 19 of section 1, article V, of the Cities and Villages Act empowers the City Council "to regulate and prevent the flying of flags, banners or signs across the streets or from houses."

A proper interpretation of this power would be to regard it in the same light as other clauses using the exact language with respect to other things. Thus, the seventeenth clause of the same section reads as follows: "To regulate and prevent the use of streets, sidewalks and public grounds for signs, sign posts, awnings, awning posts, telegraph poles, horse troughs, racks, posting hand bills and advertisements."

The word "regulate" in this clause has always been interpreted to mean that such things may be permitted

under proper regulation. Obviously this was the legislative intent, since it must be plain that provision for placing telegraph poles and a number of other things mentioned is a necessity. Hence, we conclude that the power to regulate the flying of flags and banners across the streets includes the power to permit the use of streets for that purpose under proper regulation. That being the case, the City may itself decorate or adorn the streets just as it may adorn or decorate its public buildings. The legislative grants of power are not supposed to receive so narrow a construction that they can only be adapted to a primitive people. Anything of the kind mentioned in the grant which adds to the dignity of a City and promotes the general welfare must be construed as coming within a grant of power of this kind. In fact, it may be said that the power to improve and maintain streets includes the power in question, just as the power to provide for the erection and care of public buildings includes the power to decorate them with flags.

The second question, as to whether the payment may be made out of the appropriation for Account 3-S-2, must be answered in the negative. This appropriation is for the specific purpose of checking assessed valuations and presenting information relative thereto to the Board of Assessors and Board of Review. To use the appropriation for purposes of street decoration would be a diversion of the funds of the City not warranted by law.

While you have not asked us to advise you as to which appropriations may be available for this purpose, we would naturally turn to Account 36-S-1. That is an appropriation for a contingent fund for expenses not otherwise provided for which may be expended under the direction of the Mayor and Comptroller. This so-called "Mayor's Contingent Fund" was originated in order to provide a

means for entertaining distinguished visitors officially without drawing on the personal means of the City's officers. It might well be said that the proposed use of the money for the purpose indicated by you comes within the general intention of the Council in providing for such a fund. Hence, it may properly be drawn upon to meet this expenditure.

There are other funds that may be used. The expenditure may be made by the Commissioner of Public Works, when due authority is given, from Account 81-S-61, which is designed for the repair and improvements of streets and "miscellaneous street work."

Inasmuch as council action is necessary in any event to provide for this expenditure, we recommend that the action to be taken should be of such a nature that no question may arise as to the manner of providing the fund out of which the expense is paid.

(No. 6259—August 24, 1928—F. J. V.)

1 CIVIL SERVICE, APPLICATION, NATURE OF INFORMATION TO BE SUPPLIED BY.

The application of a person for a position or place in the Civil Service of the City, under section 6 of the Civil Service Act, may, as part of the application, require a urinalysis and a report thereon, also the making of a blood test and a report thereon where the applicant has had a venereal disease, and may include such questions as are usually found in the forms prescribed by leading insurance companies in applications for insurance. But the application cannot lawfully require information which, if untrue, would cause the applicant's automatic removal from the service or which would bar the applicant from pensions or from benefits under laws other than the Civil Service Act.

2 CIVIL SERVICE ACT.

Sections 4 and 6 do not authorize the Commission to concern themselves with any other laws than the Civil Service Law.

Hon. Samuel A. Ettelson, Corporation Counsel:

There was recently submitted to us for an expression of our opinion thereon the annexed tentative letter to the Civil Service Commission proposing for adoption and administration by the Commission the plan therein stated to be "for the protection of the several pension funds created for the benefit of those employed by the City and their families, as well as to advance the individual public service of employees."

We have carefully studied the suggestions in the light of the Civil Service Act, the Pension Act and the Municipal Employees' Benefit Act for an opinion on the law involved rather than as a matter of administrative policy.

After enumerating the various benefits provided by these Acts, namely, health and accident insurance, old age and

disability pensions and annuities to dependent widows and children of deceased employees, the letter suggests that "to protect these several funds from premature demands now frequently made upon them with the resulting unnecessary depletion of the funds, safeguards should be adopted similar to those now in use by insurance concerns carrying the same class of risks. These safeguards are twofold, viz.: a. Rigid medical examination, covering physical and mental condition, made prior to the future applicant becoming entitled to appointment into the public service. b. Annual medical examination of future appointees to correct conditions threatening the health or life of the individual through the arrest or cure of systemic disorders and incipient progressive diseased conditions."

Much that follows in the letter is devoted to a statement of the facts and existing conditions affecting these funds, and to an argument in support of the plan suggested. Then we come to the concrete proposal or the specific recommendations made to the Civil Service Commission for adoption as a permanent system to be hereafter adhered to in the administration of all the Civil Service, Pension and Benefits Acts applying to all employees in the public service. These recommendations are made in the form of eight specifications.

Number One submits a series of questions to be included in the sworn application for entrance into the civil service. These questions seek to establish the physical and mental condition of the applicant and are such questions as are usually found in the forms prescribed by the leading insurance companies in applications for insurance.

Number Three provides that a urinalysis shall be taken and a report made thereon as a part of the application.

Number Four provides that where the applicant has had a venereal disease a blood test be made a part of the medical report.

These three recommendations may properly be adopted and applied as a legitimate part of the civil service examination, and no doubt to a certain extent they are already applied by the Civil Service Commission as a test of applicants for place in the public service.

Section 6 of the Civil Service Act which pertains to the scope and purpose of examinations of applicants for office or places in said classified service, provides as follows:

“All applicants for offices or places in said classified service, except those mentioned in section 11, shall be subjected to examination, which shall be public, competitive and free to all citizens of the United States, with specified limitations as to residence, age, health, habits and moral character. Such examinations shall be practical in their character, and shall relate to those matters which will fairly test the relative capacity of the persons examined to discharge the duties of the positions to which they seek to be appointed, and shall include tests of physical qualifications and health, and, when appropriate, of manual skill.”

Numbers Two, Five, Six, Seven and Eight of the recommendations submitted in the annexed letter under consideration are questionable, under the foregoing provision of section 6, as to their legal and proper application to civil service examination of applicants for employment in the public service. Our first observation is that the proposed system and the recommendations for its establishment and administration have for their principal purpose “the protection of the several pension funds created for the benefit of those employed by the City and their families.” To us it seems that the burden of the pro-

posul here made is primarily to test the physical and mental fitness of the applicant for life insurance, pensions, annuities and participation in municipal benefit funds; and that in the system and recommendations suggested, the primary purpose of the civil service examination is subordinated and limited thereby, which purpose, as stated in said section 6, is to "fairly test the relative capacity of the persons examined to discharge the duties of the positions to which they seek to be appointed and shall include tests of physical qualifications and health, and, when appropriate, of manual skill." The provision in section 6 that the civil service examination "shall include tests of physical qualifications and health" is for the purpose of securing capable and efficient service from the applicants, and not so much for the purpose of testing their qualifications for pensions, annuities and other funds, which in our opinion are secondary and incidental to the Civil Service Act and the classified public service thereby created.

Numbers Two, Five, Six, Seven and Eight, in our opinion, tend only to qualify or disqualify the applicants in the civil service examinations for the pensions, annuities and funds provided by the Pension Act and the Municipal Benefit Fund Act, and may therefore be questioned in their application to these examinations as a test for employment in the classified civil service under the Civil Service Act. More specific objections to recommendations Numbers Two, Five, Six, Seven and Eight, may be stated as follows:

Number Two provides that substantially the following agreement shall be made a part of the affidavit of the applicant, to wit.: "I hereby agree that the falsity of any answer in this application shall be deemed a fraud and misrepresentation on my part and shall bar the right

to recover either salary from the City of Chicago or any benefits from any pension fund for City employees during any period of disability or retirement from the service if the physical or mental condition so misrepresented is or becomes the cause of such disability or retirement within five years from the date of my appointment; and if such disability be of a permanent nature I agree that my appointment may be vacated and set aside for fraud."

Number Five provides that the sworn statement of the applicant respecting the existence of certain diseases and physical and mental conditions shall constitute warranties that "shall be in force and effect for a period of five years from the date of said formal statement and render his appointment void for fraud and misrepresentation if untrue."

Recommendation Number Six requires as a part of the application "that the applicant consents to be examined annually while in the service, by a physician designated by the Health Department of the City of Chicago, and to procure dietetic or medical treatment as may be recommended, or as a physician engaged by the employee himself may deem necessary." This recommendation further provides that such annual examination shall be without cost to the applicant and "that refusal on his part to be examined and to procure any treatment for diseases reported to him would constitute grounds for dismissal from the service."

The foregoing requirements for qualification into the classified civil service are not warranted by, and, as we believe, are in excess of and contrary to the requirements of the Civil Service Act as a test for entrance into the public service. It is our opinion that the applicant cannot be required to enter into any such contract as a condition precedent to his entry into the public service under the

Civil Service Act. It also is our opinion that under the Civil Service Act and the decided cases the only procedure by which a civil service employee may be removed from his position is by written charges and a trial had thereon before the Civil Service Commission. We do not think, therefore, that the provision in recommendations Numbers Two, Five and Six for the automatic removal of one in the civil service upon the condition subsequent that his examination statements may prove untrue can be sustained under the present law. Nor do we believe that the provision in recommendations Six, Seven and Eight for compulsory annual examination and especially the provision that the civil service employee's refusal to submit to examination shall constitute grounds for dismissal from the service are warranted by the Civil Service Act. Such provisions come within the purview of the Pension and Municipal Employees' Benefit Fund Acts and not within that of the Civil Service Act.

It is proposed to submit the system and recommendations outlined in the annexed communication to the Civil Service Commission for adoption and administration. As already stated we do not believe that this comes within the purview of the Civil Service Act, nor is it within the grant of power to the Civil Service Commission to adopt such system and rules. Section 4 of the Civil Service Act expressly provides that "said Commission shall make rules to carry out the purposes of this Act, and for examinations, appointments and removals in accordance with its provisions, and the Commission may, from time to time, make changes in the original rules." We do not think that the proposed rules for protecting the pension and benefit funds are authorized by this Section 4 of the Civil Service Act.

As heretofore indicated the suggestions made are primarily matters coming within the scope of the Pension Acts and the Municipal Employees' Benefit Fund Act and are therefore controlled by the provisions of those Acts. We do not believe the suggestions here made can lawfully be adopted as a part of the civil service administration without legislative amendment of said Act or amendments of the Pension and Municipal Employees' Benefit Acts. It is likely that the courts would construe as *in pari materia* all three of the Acts above named, but even in this view of the law we do not believe there is anything to be found in either the Pension Acts and the Municipal Employees' Benefit Fund Act or the Civil Service Act that would warrant the adoption of the suggested system of civil service examination.

As a matter of policy with respect to promoting and improving the administration of all the laws here involved the recommendations here made seem to commend themselves favorably, but the law as it is at present makes this impossible, and requires amendment either of the Civil Service Law or of the Pension Acts and Municipal Employees' Benefit Fund Act.

(No. 6260—August 28, 1928—L. H.)

1 APPROPRIATIONS, "STRING" ATTACHED, CALUMET HARBOR FUND.

An appropriation for a definite amount "to be expended * * * as directed by the City Council" cannot be used without such direction. Thus the appropriation of \$1,125,000 for the Calumet Harbor construction with above condition can be expended only upon previous or antecedent Council action as to the nature of the improvement and the manner in which it is to be carried out.

2 ADVERTISEMENT FOR BIDS, APPROPRIATION ESSENTIAL AS CONDITION PRECEDENT.

An available appropriation for doing a particular kind of work is essential as a prerequisite to the right to advertise for bids, as no valid contract can be awarded until there is an appropriation authorizing such work.

Hon. Richard W. Wolfe, Commissioner of Public Works:

We are in receipt of your letter of recent date in which you ask whether it is legal and possible for you to solicit bids for the construction of Calumet Harbor.

You state in your letter that you are informed that we have given an opinion that the \$1,200,000 levied for the Calumet Harbor Fund "is available for the construction of Calumet Harbor and for no other purpose, and that if this money is not used for such work it will not be available for the Corporate Fund or for any other purpose whatsoever."

If the said information is predicated on the impression you get from our opinion on the proposed amendment of the Tax Levy Ordinance, which we rendered under date of June 30, 1928, we believe you have taken rather an extreme view of the language used. We did say that the repeal of the item by amendment of Tax Levy Ordinance

would not have the effect of increasing the levy for other purposes. If the levy were permitted to stand, however, and at a later date, when the tax reduction ordinance is passed, the amounts levied for this purpose were to be reduced to the vanishing point, it is quite possible that the moneys collected on the levy at that time would revert to the general corporate fund. There is some doubt about this, but it would seem as though that would be the natural and logical result of the reduction of this item after the levy was made and in course of collection.

With respect to the question of whether it would be legal for you to solicit bids, we believe you will have to look to the appropriation recently made for preliminary work rather than to the large appropriation for construction work in order to do this. The appropriation for the construction work reads as follows:

“For Harbor construction work and all incidental expenses in connection therewith. To be expended under the supervision of the Mayor, Comptroller and Commissioner of Public Works and as directed by the City Council...\$1,125,000.00
336-S-1”

In order to avail yourself of this appropriation there would have to be some antecedent direction of the City Council. In other words, the Council by this appropriation set aside the fund for the purposes of this improvement so that a contract could be let and expense incurred, but nevertheless retained enough control over the fund to prevent its being used until further legislative action will be taken by it. It must be assumed that it was the intent of the City Council to prevent the work from going ahead until it was satisfied with the kind of improvement proposed and the manner in which it is to be done.

By a recent order of the City Council authority was given to you to proceed with the preliminary work on this project and to pay for such preliminary work out of Account 70-S-3. (See Council Journal, July 11, 1928, p. 3349.) Through the use of this last mentioned appropriation you would be able to proceed with the advertisement of the proposed contract if you are ready with plans and specifications. It is doubtful, however, whether this could be regarded as a compliance with the law relating to advertising for bids, in the absence of an available appropriation for doing the work provided for by the proposed contract. In other words, no right to be awarded a contract can be claimed by the lowest bidder, and the bidders would not be bound to enter into a contract in conformity to their bids, under these circumstances.

If the City Council sees fit to direct that you proceed with the improvement the appropriation from the Harbor Fund would authorize you to proceed and let a contract, but until that is done any bids submitted would necessarily be informal and would not bind either party.

In its last analysis, the question you ask is not a question of law, but a question of policy. If it is deemed proper to proceed with the work the appropriations are in such shape that they can be made available either by antecedent action on the part of the City Council or by ratification if a tentative agreement for a contract is entered into.

(No. 6261—August 28, 1928—R. N. L.)

1 STREETS AND ALLEYS, HAINES STREET, VACATING ORDINANCE.

The Vacating Ordinance of March 1, 1886, vacating Haines street from Crosby street to the easterly line of Hawthorne avenue and from the western line of that avenue to the North Branch Canal was passed according to the then existing laws, is valid and in effect; the Ordinance of May 24, 1886, being ineffectual as a repealing ordinance on account of the owners of the property involved having taken immediate possession of their properties before the repealing ordinance was passed, and paying taxes thereon.

2 VACATING ORDINANCE, REPEAL.

An ordinance vacating a street can be repealed only before it has gone into effect and no rights have become vested.

Hon. John D. Riley, Superintendent of Maps:

Replying to your letter of this date relative to the vacation of Haines street between Hawthorne avenue and the North Branch Canal, the following is submitted:

On March 1, 1886, an ordinance was passed, by the City Council, vacating said Haines street from Crosby street to the easterly line of Hawthorne avenue and from the western line of Hawthorne avenue to the North Branch Canal. Said ordinance appears on page 541 of the Council Proceedings of 1885-1886. On page 220 of Cothran's Statutes of Illinois, 1885, paragraph 30, article 3 of the Cities and Villages Act, it is stated "that (in) any cities of over 100,000 inhabitants there shall be elected 36 aldermen and no more." The Council Proceedings of March 1, 1886, relative to the passage of said vacating ordinance, shows there were 28 yeas, no nays.

Page 1523, chapter 145, Cothran's Statutes of Illinois, 1889, covering the vacation of streets, alleys, and highways, reads as follows:

"1. That no city council of any city, or board of trustees, of any village or town, whether incorporated by special act or under any general law, shall have power to vacate or close any street or alley, or any portion of the same, except upon a three-fourths majority of all the aldermen of the city or trustees of the village or town authorized by law to be elected; such vote to be taken by ayes and noes, and entered on the records of the council or board. And when property is damaged by the vacation or closing of any street or alley, the same shall be ascertained and paid as provided by law.

"2. When any street, alley, lane or highway, or any part thereof, has been or shall be vacated under or by virtue of any act of this State, or by order of the city council of any city or trustees of any village or town, or by the commissioners of highways, county board, or other authority authorized to vacate the same, the lot or tract of land immediately adjoining on either side shall extend to the central line of such street, alley, lane or highway, or part thereof so vacated, unless otherwise specially provided in the act, ordinance or order vacating the same, unless, in consequence of more of the land for such street, alley, lane or highway having been contributed from the land on one side thereof than the other, such division is inequitable, in which case the street, alley, lane or highway so vacated shall be divided according to the equities of the adjoining owners."

The records of the proceedings of March 1, 1886, covering this ordinance, showing there were 28 yeas, which is one more than the necessary three-fourths vote, prove that this ordinance was passed according to the statutes. It may, therefore, be assumed that the vacating ordinance was valid, and that the vacation became a fact.

An ordinance repealing the above ordinance, so far as it referred to the vacation of Haines street, was passed

on May 24, 1886 (Council Proceedings of 1886-1887, page 108), upon recommendation of the then Corporation Counsel. The question then is did the Ordinance of May 24, 1886, purporting to repeal said vacating ordinance have the effect of restoring said street as it was before the vacation?

In the case of *Gormley v. Day*, 114 Ill. 185, the court, in considering a similar question decided that "an ordinance vacating a street may be repealed before it has gone into effect, before any rights have become vested in it."

The Supreme Court of Kansas, in a well considered case, held that the city cannot by repealing an ordinance vacating an alley, re-establish the alley. The court says:

"The next proposition is, that ordinance No. 62 repealed the vacating one and by the repeal the city again became invested with all its former rights in the alley. This is easily disposed of by the application of not only familiar but fundamental principles. When the alley was vacated by the ordinance it was the same in legal contemplation as if it had never existed; as if it was a town lot and not an alley. The alley was not restored to the city by the operation of the repeal. If it was found that a mistake was made, and that the public convenience required the alley, the only remedy was to open it in accordance with all requirements of law, and this would be one of the modes of the exercise of the power of eminent domain." *Belleville v. Hallowell*, 41 Kan. 192.

A further investigation shows that immediately following the vacation of the property in question, the owners of the properties on either side of said vacated property, went into possession of said vacated property and have been in possession of same since 1886, and that they have paid taxes on same since 1919.

Therefore, it is our opinion that the repealing ordinance of May 24, 1886, was ineffectual in re-establishing

Haines street, and that unless said Haines street has in the meantime been reopened by proper proceedings for that purpose, said street does not exist between the points specified in the Ordinance of March 1, 1886. If it is desired to open said street, it can only be done by proper proceedings such as will be necessary in the case of the opening of an entirely new street.

(No. 6262—August 30, 1928—W. W.)

ELEVATED RAILROADS, STRUCTURE, READJUSTMENT ON
ACCOUNT OF VIADUCT, COST OF.

The entire cost of the readjustment of the Elevated Railroad structure in Carroll avenue and North La Salle street made necessary by the construction of the new viaduct to the La Salle street bridge must be borne by the Elevated Railroad Company, there being no contract obligation between the City and the Northwestern Elevated Railroad Company by reason of special ordinance of January 8, 1894, and a similar ordinance of July 17, 1908, or any other ordinances on the part of the City to share such cost or expense.

Hon. Richard W. Wolfe, Commissioner of Public Works:

Your letter of recent date requests an opinion "regarding the City's obligation to contribute toward the cost of readjusting the elevated railroad structure in Carroll avenue at North La Salle street." The letter further states "this readjustment is necessary to permit completion of the North La Salle street viaduct which constitutes the north approach to the new La Salle Street Bridge."

Permission and authority to operate an elevated railroad in Chicago along certain designated routes was given to Northwestern Elevated Railroad Company in the special ordinance of January 8, 1894 (Council Journal 1894, page 1445). Section 8 of said ordinance reads:

"The City of Chicago reserves the right at all times, and whenever it may deem necessary, to change the grade of any street or alley across which the Northwestern Elevated Railroad Company may cross, without incurring any liability on the part of the city to said company, and upon notice from the Commissioner of Public Works, acting under the authority of the ordinance of the City of Chicago, directing such change of grade, the said company, in case such grade shall be raised more than eight inches, shall immediately proceed to change its structures across any street where the grade has been so raised, to conform to the changed grade, in such manner that the distances and heights provided in this ordinance shall not be reduced more than eighteen inches, and such change of structure shall be without expense to the city.

"The City of Chicago reserves the right, whenever it may deem necessary, to erect and construct a viaduct and approaches thereto upon any street over which the Northwestern Elevated Railroad Company may cross, without incurring any liability on the part of the city to said company, for any damages whatsoever, and the said company shall immediately and with reasonable dispatch change its structure over any street where such viaduct and approaches are ordered to be constructed, upon notice from the Commissioner of Public Works, acting on the authority of an ordinance of the City of Chicago, directing the erection of such viaduct, and the said company shall rebuild and reconstruct the said railroad in such manner as to the distance and heights of the same over said viaduct, not exceeding fourteen (14) feet, as may be required by an ordinance of said city, and such change of structure shall be without expense to the city and at the expense of said company. If the said company, after having been notified in writing by the Commissioner of Public Works, acting under the authority aforesaid, to change the structure over any street where the grade has been changed, or after having been notified to change its structure where any viaduct has been ordered to be built by the City of Chicago, shall fail to proceed to do so as above provided within six months from the date of service of said notice, then the City of Chicago may remove the entire roadway structure, tracks and railway sys-

tem of said company from such street within which said viaduct is to be erected, or grade is changed, and shall not be liable to said company for any damages of any kind whatsoever for the aforesaid removal, but the said company shall pay to the City of Chicago the entire cost and expense of such removal."

Later on the Company decided to build the stub line serving the well known station on North Clark street just north of the Chicago River. Another special ordinance was passed which conferred the right to construct and operate a branch line on North Water street (now Carroll avenue) "from a connection with the line of railroad of said company in Wells street to the west line of North Clark street." (Council Journal 1908-9, page 1309.) Paragraph 5 of section 4 of said ordinance reads:

"No part of the girders of the superstructure shall be less than twenty feet above the present established grades of streets and alleys, and wherever said elevated structure crosses or passes over the right of way and tracks of all existing steam railroads the clear headroom between the lower chord of all of said girders and the surface of the rails on all of said railroads, or their present or hereafter established grades, and from out to out of their right of way, shall not be less than twenty feet; provided, however, that if the Chicago and Northwestern Railway Company should at any future time be required by an ordinance of this city to elevate its tracks in said North Water street, between said Wells street and said Clark street, then the Northwestern Elevated Railroad Company will remove its structure, or make a corresponding elevation of its tracks, station and appurtenances so as to maintain the clear headroom as above required between the lower chord of the girders and the surface of the Chicago & Northwestern Railway Company's rails."

The above quoted sections comprise all the ordinances of the City Council touching this question. It is apparent that no contract exists between the City of Chicago and

Northwestern Elevated Railroad Company, or its successors and assigns which specifically provides for a definite apportionment of expense between the parties in a case similar to the facts in question.

All contracts with and grants of power to Northwestern Elevated Railroad Company are subject at all times to the use of the streets by the public and the reserved police power to regulate that use.

Improvements, such as the La Salle Bridge with its approaches, are of admitted public convenience and necessity and as such are clearly an exercise of the delegated sovereign police power. Where the improvement is obstructed by the elevated railroad structure of this Company then the elevated structure must be altered so as not to remain an obstruction. This power cannot by any number or kind of contract ordinances be nullified nor compromised.

The widening of 22d street involved a legal question which is decisive of the case here presented. Chicago City Railway Company operates surface cars over two tracks on 22d street. The widening of that street necessitated the removal of the tracks to the middle of the street as and when widened. Although this entailed an expenditure of \$300,000 our Supreme Court held that not the City of Chicago but the street car company must stand the cost of moving the tracks. *People ex rel. City of Chicago v. Chicago Street Railway Company*, 324 Ill. 618.

We therefore beg to advise that no contract with Northwestern Elevated Railroad Company is necessary as contemplated in your letter. It is our opinion, based upon the authority cited above, that notice should be given Northwestern Elevated Railroad Company to readjust its elevated structure as stated. If the Company fails to make this readjustment then court proceedings may be instituted to compel it to act.

(No. 6263—August 30, 1928—L. H.)

1 ORDINANCES, GRAVITY WARM AIR HEATING PLANTS,
INSPECTORS.

The provision in the Ordinance of December 28, 1927, governing the installation of gravity warm air heating plants which requires the expense of inspection to be paid out of fees received for permits is contrary to section 5, article 7 of the Cities and Villages Act and is made inoperative by the Annual Appropriation Bill of 1928 providing for ten sheet metal inspectors at a fixed salary. But this does not invalidate the ordinance itself in so far as it applies to inspection and licenses.

2 INSPECTION, INSUFFICIENT NUMBER OF INSPECTORS,
ENFORCEMENT OF ORDINANCE.

An officer charged with the duty of making inspections cannot refuse performing that service because of an insufficient number of men allotted to him for the purpose, but must do the best he can with the men employed and apply to the City Council for authority to employ more.

3 FUNDS, LICENSE FEES MUST BE TURNED INTO CITY
TREASURY.

Provision in an ordinance directing that the expense of inspection shall be paid directly from license fees without first turning the moneys into the City Treasury as part of the General Corporate Fund is contrary to section 5, article 7 of the Cities and Villages Act.

4 CITY COMPTROLLER, APPROVAL OF PAYROLL.

The refusal to approve a payroll containing the names of inspectors or other municipal employees who are entitled to their pay while any portion of an appropriation remains unexpended is ground for legal process against the Comptroller.

Hon. Christian P. Paschen, Commissioner of Buildings:

Your letter of recent date relating to the Ordinance Governing the Installation of Gravity Warm Air Heating

Plants was referred to the undersigned for consideration and reply.

The ordinance in question was passed on December 28, 1927 (Council Journal, pp. 1662-1668.) The ordinance provides drastic penalties for violation, repeals all ordinances or parts of ordinances in conflict therewith, and has a section providing for the enforcement of all valid provisions in case any section or provision should be held invalid by a court of competent jurisdiction.

In your letter you point out a number of things in the ordinance, among which is the provision that requires all parties who construct, replace or install warm air heating furnaces or appurtenances to obtain permits from the Commissioner of Buildings, also the provision making it the duty of the said Commissioner to make inspections, and the sentence which reads as follows: "The expenses of such inspection shall be paid out of the fees received for permits to install or construct warm air furnaces and appurtenances."

You state that the returns from the permits are insufficient to pay the salaries of the inspection force, and that as a consequence the City Comptroller has refused to approve the payroll, thereby rendering it necessary to separate these inspectors from the service of the City. You further say that you have been advised that the requirement of the ordinance to the effect that the expense of the inspection shall be paid out of the fees received is of questionable validity.

Under the provisions of the ordinance the inspectors to be employed for this purpose must be competent journeymen sheet metal workers. This provision, you say, precludes the use of your regular inspection force for this work.

You indicate that the action of the City Comptroller in refusing to approve the payroll has left the ordinance unenforceable. You ask for our opinion as to the validity of the ordinance and for advice as to the course you should pursue with reference to it under the circumstances presented.

The provision in the ordinance stating that the expense of inspection shall be paid out of the fees received for permits, if construed to mean that the money can be used directly without turning it in to the City treasurer as a part of the general corporate fund, is contrary to the statute which prescribes the duties of the treasurer. This reads as follows:

“The treasurer shall receive all moneys belonging to the corporation, and shall keep his books and accounts in such manner as may be prescribed by ordinance, and such books and accounts shall always be subject to the inspection of any member of the city council or board of trustees.” Sec. 5, art. 7, Cities and Villages Act, Smith’s Stat. 1927, p. 355.

Section 96 of the Chicago Municipal Code of 1922 reads as follows:

“License fees, fees for inspections, fees for permits, compensation for franchises and all other payments of money not otherwise specifically provided for, to the city, shall be paid direct to the city collector, and such payments shall be by the city collector transmitted daily to the city treasurer; provided, that where the public convenience requires it, the department of finance may authorize the payment of license fees and fees for permits to be made to the officer authorized to issue such license or permit; and, provided, further, that collections by the water bureau shall be paid direct to the city treasurer; and, provided, further, collections of fines by the municipal court shall be transmitted according to law to the city collector.”

In view of the section of the statute and the ordinance above quoted, the only effect of the provision in question requiring the expense of inspection to be paid out of the fees received for permits is to indicate that the City Council desires to keep the expense within the revenues received for the purpose. The provision in any event would be overcome by the later enactment of the City Council whereby it provided in the Annual Appropriation Bill for 1928, passed January 9, 1928, that ten sheet metal inspectors may be employed by you at annual salaries of \$3,720 each. It is this appropriation that controls the approval of the payroll, and not the general statement, contained in the ordinance of December 28, 1927, that the inspectors should be paid from the fees for permits.

The question of the validity of the ordinance has nothing to do with the provision that the City Council has made for inspectors. The Council is by law required to make provision for the needs of the City in its appropriation bill, but the failure to provide money for inspectors will not invalidate an ordinance passed under the police power which is otherwise valid and enforceable. You state truly in your letter that the ordinance is still in effect and that you are charged with the duty of enforcing it. For this purpose you have authority to employ ten inspectors at the rate provided for in the appropriation ordinance. These inspectors are entitled to their pay, and would be able to force payment by legal process if the Comptroller refused to approve payrolls for them while any portion of the appropriation remained unexpended.

Under these circumstances it will be your duty to make the inspections required by the ordinance. If the force of inspectors you are able to employ under this appropriation is insufficient the duty nevertheless remains to do the best that can be done with these men. If the work of in-

spection lags on account of a lack of inspectors the City Council should be informed, to the end that an adequate appropriation should be made. But there is no more ground for failing to enforce the ordinance on account of an insufficient appropriation than there would be to fail to enforce the other building ordinances on account of a lack of men.

The ordinance is highly technical with respect to requirements for the buildings to which it is applicable. It is possible that some of these requirements are of such a nature that they will be held invalid. But this would apply only to such specific requirements as are open to objection because unreasonable, discriminatory, tending to create a monopoly, or some other fault that renders them unlawful. It is not necessary for the purposes of this opinion to make a scrutiny of these requirements to determine whether there are any of them objectionable for the reasons indicated. As to all other requirements specified in the ordinance that are not subject to such objections, and especially so far as the general requirements for permits and inspection are concerned, the ordinance comes within specifically enumerated police powers of the City, and is valid.

The following two clauses conferring power on the City in themselves are sufficient to authorize an ordinance of the general nature of the one before us:

“Sixty-first. To prescribe the thickness, strength, and manner of constructing stone, brick and other buildings and construction of fire escapes thereon.”

“Sixty-third. To prevent the dangerous construction and condition of chimneys, fireplaces, hearths, stoves, stove-pipes, ovens, boilers, and apparatus used in and about any building and manufactory, and to cause the same to be removed or placed in a safe condition, when considered dangerous; to regulate and prevent the carrying on of manufactories dangerous

in causing and promoting fires; to prevent the deposit of ashes in unsafe places, and to cause all such buildings and enclosures as may be in a dangerous state to be put in a safe condition." Sec. 1, art. 5, Cities and Villages Act, Smith's Stat. 1927, pp. 339, 340.

We therefore beg to advise you that the ordinance should be enforced as a valid police ordinance that was duly passed and is now in effect.

(No. 6264—August 31, 1928—W. W.)

NUISANCE, ABANDONED STONE QUARRY, ABATEMENT.

An abandoned stone quarry, which is likely to and does attract the children of the neighborhood and had caused their injury, is regarded as a nuisance which the City authorities may order the owners of the quarry to guard or protect against the intrusion of children, and upon failure of the owners to do so, the City may institute proceedings to abate such nuisance.

Hon. William A. Rowan, Alderman, 10th Ward:

In your letter of recent date you ask for an opinion "relative to the obligations of the City or the owners to protect the children who frequent an abandoned quarry in the vicinity of 92d street and Stony Island avenue."

Unguarded premises of a dangerous character which are likely to attract children from a place where they have a right to be are regarded as holding out an implied invitation to children, which will make the owner of the premises liable for injuries to them, even though they be technical trespassers. Such places are considered nuisances in contemplation of law and, as such, the City authorities

may compel the owner to provide protection against same and, upon his failure to do so, said nuisances may be abated by appropriate court proceedings. If the stone quarry in question is so located that it naturally attracts children thereto and is a source of danger to such children, then we believe the City authorities are vested with the power to require the owner of said premises to guard and protect the same against the intrusion of children.

In this connection your attention is called to certain ordinances of the City Council contained in the following sections of the Chicago Municipal Code of 1922:

“1532. What constitutes a nuisance.) Any building, structure, enclosure, place or premises perilous to life or property by reason of the nature, condition or quantity of its contents or its use, or the overcrowding at any time of persons therein, or by reason of deficiencies in such fire alarm or fire prevention equipment as may be required by the provisions of this chapter, is hereby declared to be a nuisance and within the meaning of the word as used in this ordinance, and the chief of fire prevention and public safety is empowered and directed to cause any such nuisance to be abated.”

“2695. Clay holes and excavations.) The owner, lessee or person in possession of any real estate within the city upon which are located or situated any clay holes or other similar excavations is hereby required to cause such clay holes or other excavations to be inclosed with wooden or wire fences of not less than six feet in height. When such fences are of wire, only smooth or non-barbed wire shall be used, and such fence or fences shall consist of not less than eight rows of wire, and such rows of wire shall not be more than nine inches apart. Any person violating any of the provisions of this section shall be fined not more than two hundred dollars for each offense.”

(No. 6265—August 31, 1928—J. R.)

DAMAGES, HYDRANT LEAD BLOWN OFF, CITY NOT
LIABLE.

The City is not liable for damages caused by the blowing off of a hydrant lead, in the absence of negligence in the construction and maintenance of its water mains and hydrants.

Hon. John S. Clark, Chairman of Finance Committee:

Replying to your request for an opinion as to the liability of the City with reference to the above and other claims, arising out of the water damage to the property of patrons of the Plaza Hotel, located at the southeast corner of Clark street and North avenue, would state that I have made an investigation in the matter and find the facts to be as follows:

On August 9, 1927, the 2½ inch D. C. hydrant on the southeast corner of Clark street and North avenue, blew off the hydrant lead. The Water Pipe Extension Department received a complaint at about 2 p. m. and the complaint was immediately referred to the North District. District Superintendent Garrity arrived on the scene about 2:25 and they immediately proceeded to shut off the water flow. However, before they succeeded in stopping the flow of water considerable damage was done to the property of the patrons of the Plaza Hotel, who had trunks and other merchandise stored in the basement.

A municipality is bound to exercise due care and skill in constructing and maintaining water mains and hydrants for the distribution of water, but they are not insurers of the safe condition of property, and consequently are not liable for damages that could not have been prevented by the exercise of due care and caution.

McQuillin on Municipal Corporations, volume VIII, page 8287, states:

“In all sewer or water main cases cited by the plaintiff in which the city was held liable there was either evidence of actual negligence in the construction or operation of the water main or sewer, or notice to the city authorities of the break or overflow, accompanied by neglect on their part to repair promptly, or actual notice by reason of like prior occurrences that the sewer or pipe were defectively constructed or maintained. * * * A municipality is not an insurer of its water or sewer system any more than of its streets. It is required only to use reasonable care in establishing and maintaining such a system.”

In the case of *Selz, Schwab & Co. v. City of Chicago*, 202 Ill. 549, the court said:

“There were no facts stated from which the law would imply a duty of inspecting the pipes laid deep in the earth below the streets, or any facts showing for what reason an inspection would or could be necessary. Judging from the facts stated in the count, an inspection of mains and pipes under the streets would be impossible, and if there were any facts showing the necessity or propriety of such an inspection they should have been alleged.”

As there was no negligence on the part of the City or its employees in the original construction of the hydrant, nor was there any negligence on its part either in its maintenance in making repairs or otherwise, I am of the opinion that the City is not liable.

(No. 6266—September 4, 1928—L. H.)

SEWAGE DISPOSAL, CONTRACT BETWEEN CITY AND
SANITARY DISTRICT, VALIDITY.

The City Council under clauses 40 and 57, section 1, article 5 of the Cities and Villages Act and the Sanitary District of Chicago under the Enabling Act of June 28, 1923, have power to enter into a contract for the construction and maintenance of a pumping station for drainage and sewage disposal.

*Hon. Leonard J. Grossman, Chairman, Mayor's Sewage
Commission:*

You submitted to us the forms of proposed contract to be entered into by the City and the Sanitary District of Chicago whereby the Sanitary District is to do certain sewerage, pumping station and conduit construction work and maintenance for the purpose of drainage and sewage disposal and the City makes certain grants in respect to streets and City property in furtherance of the object to be attained.

You ask for an opinion on questions which are embodied in the following two paragraphs which are taken from your letter:

"I have been directed to formally inquire of you as to the legal rights of the Sanitary District to the use of Chicago's streets as set forth in the proposed accompanying Agreement, which I believe, is a question answered on the face of the Agreement itself, and about which there can be no doubt.

"Since I have been directed to solicit your legal opinion on the rights of the City and the Sanitary District with reference to the attached Agreement, and whether or not the Sanitary District is under this Agreement invading the legal rights of the City, may I thank you for your legal opinion on these matters at the earliest possible moment?"

The draft of the proposed contract which you submitted contemplates the construction of two separate sewage pumping stations by the Sanitary District, also the extension of certain conduits and intercepting sewers, and the doing of other things in relation to providing a more adequate system of sewage disposal and drainage for the southern portion of the City; and the City in turn grants certain rights and easements to the Sanitary District tending towards the same object.

You have truly said in your letter that the question of the legal right of the Sanitary District to use the City's streets in the manner set forth in the agreement is a question that is answered on the face of the agreement and about which there can be no doubt. The whole matter is one of agreement between two corporate bodies each of which thereby pursues functions which it is authorized by law to perform.

The City of Chicago, by clause 40, of article V, section 1, of the Cities and Villages Act, is empowered "to provide for the cleansing and purification of waters, water-courses and canals, and the drainage or filling of ponds on private property, whenever necessary to prevent or abate nuisances." This in itself is enough to authorize the City to make a contract of the kind in question with any other governmental authority that has the power to perform thereunder. There are other clauses of the same section of the statute which amplify the power thus given. For instance, clause 57 enables the City "to regulate the construction, repairs, and use of vaults, cisterns, areas, hydrants, pumps, sewers and gutters." Other grants of power could be referred to, but there is no occasion for looking farther for the authority of the City to make any contracts that may be deemed necessary by the City Council for the purpose of properly draining the City or handling and disposing of its sewage.

With respect to the Sanitary District of Chicago, there was little doubt but that the original act granted sufficient authority for it to enter into such a contract as this, and it actually did make similar contracts with the City of Chicago, as is evidenced by the recitals in the draft of the proposed contract. But, if there ever was any doubt as to this, it was removed by the passage of the enabling Act of June 28, 1923 (Cahill's Stat., 1927, chap. 42, pars. 392-3, p. 1070). Section 1 of this Act reads as follows:

"That the Sanitary District of Chicago be and it is hereby authorized and empowered to contract upon such terms as may be agreed upon with the corporate authorities of any city, incorporated town or village within the limits of the Sanitary District of Chicago to allow and permit the Sanitary District of Chicago to enter upon and use any sewer or drain or any system of sewerage or drainage or any part thereof or any sewage treatment works or part thereof of any such city, incorporated town or village, and to enlarge, reconstruct, repair, maintain and operate the same."

The Act just quoted contains a provision which is designed to validate prior contracts. Consequently, the General Assembly has made provision for contracts of this kind and has ratified those that have heretofore been made. It will therefore be proper for the City to enter into such a contract as is proposed if the City Council sees fit to order it.

(No. 6267—September 5, 1928—W. W.)

1 LICENSE, POOL AND BILLIARD TABLES, Y. M. C. A.

Pool and billiard tables may be operated by the Young Men's Christian Association without a license, said Association being regarded as a charitable organization within the meaning of section 331 of the Municipal Code of 1922.

2 WORDS AND PHRASES.

The term "charitable organization" in section 331 of the Municipal Code of 1922 includes the Young Men's Christian Association of Chicago.

Hon. George Seebacher, Superintendent, Department of License:

Your letter of recent date brings up the question whether or not the Young Men's Christian Association of Chicago is such a charitable organization as to be excepted from the provisions of the City ordinance prescribing licenses for the operation of pool and billiard tables. The language of the Municipal Code applicable to this situation reads as follows:

"No person, society, club, firm or corporation shall open, conduct, maintain or operate a billiard room within the city, unless such person, society, club, firm or corporation shall have first been duly licensed for such purpose and shall have obtained a permit therefor; provided, however, that the provisions of this section shall not apply to private residences, schools, municipal institutions or charitable organizations." Sec. 331, Municipal Code of 1922.

The Young Men's Christian Association of Chicago has been considered by the courts to be a charitable organization for the purpose of taxation, and we have no doubt if this question ever arose as a controverted issue in court that under said section of our Code it would be consid-

ered a charitable organization and that no license would be required for the operation of pool and billiard tables by the Y. M. C. A. in the ordinary course of its usual activities.

(No. 6268—September 6, 1928—L. H.)

1 MUNICIPAL FUNDS, LOAN FROM SURPLUS FUND.

It has been the practice of the City Council to authorize the borrowing of money from surplus funds in the City Treasury in anticipation of tax anticipation warrants to meet a deficiency in the General Corporate Purposes Fund, although there is no express authority in the Municipal Fund Act of 1911 as amended for the exercise of that power.

2 CITY COMPTROLLER, PERSONAL LIABILITY.

The City Comptroller could not be held personally accountable in carrying out the provisions of an ordinance which authorizes the transfer of moneys from the surplus funds in the City Treasury to the General Corporate Purposes Fund to meet deficiencies where the funds are applied for the benefit of the City and all City officers act in good faith.

Hon. George K. Schmidt, City Comptroller:

You submitted to us a copy of a proposed ordinance whereby it is intended that the City Comptroller shall be authorized to borrow and the City Treasurer shall be authorized to lend to the City the sum of \$12,000,000 out of surplus funds in the City Treasury not immediately needed for the purposes for which it is held, and have asked us to advise you whether any personal liability will be assumed by you if you carry out the provisions of the ordinance, and whether the responsibility for the action of

the City Council will rest on you if you carry out its directions in accordance with the terms of said ordinance.

The proposed ordinance is simliar in form to ordinances that have been passed late in the fiscal year from year to year authorizing such loans to supply the needs of the City for the balance of the current year. The last ones passed by the City Council appear under dates of November 2, 1927, and November 30, 1927, respectively, in the Journal of the Proceedings of the City Council, at pages 1235-6 and 1432.

The proposed ordinance recites that a large portion of the revenues for the year 1928 will not be collected or deposited with the City Treasurer during the current fiscal year, that in consequence thereof there will not be sufficient money in the General Corporate Purposes Fund with which to meet the payrolls of the Police, Fire, Health and other departments of the City governments during the remaining months of the current fiscal year; that there is approximately \$12,000,000 of such uncollected revenue that will be turned into the City Treasury in the year 1929, and that, in order to meet the deficiency, the Comptroller is authorized to borrow and the Treasurer is authorized to lend the sum of \$12,000,000 from such funds, as needed, in order to meet the said payrolls and other necessary expenses for the remaining months of the year 1928.

While it is provided that the said loan shall be repaid out of moneys in the General Corporate Purposes Fund as soon as warrants in anticipation of taxes for the year 1929 can be lawfully issued, it should be noted that there is no provision made for such a contingency as is recited in the ordinance, or for such a loan, in the Act concerning Municipal funds, approved June 5, 1911, as amended (Smith's Stat., 1927, p. 463), under which loans from surplus funds in the treasury are authorized. The same thing

has been done from year to year, it is true, but such a transaction amounts to anticipating tax anticipation warrants, and we are unable to find authority for same in the law.

With respect to your personal liability or the responsibility which attaches to your acts in relation to the ordinance, if passed, we can only say that if the money so obtained is expended only for such purposes as it could legally be expended for if lawfully transferred and placed into the General Corporate Purposes Fund, and there is no element of fraud, collusion or other irregularity in the case, you will probably be liable only if there is gross negligence in the handling of the funds.

As we view the situation, the City Council has taken from you the exercise of judgment in the handling of these funds and has assumed it as a legislative function. Under such circumstances the liability of the public officer is not such that he will be held accountable if he follows the direction of the legislative body.

In Black's Handbook of American Constitutional Law, which is one of the volumes of what is known as the "Hornbook Series," comprehending a number of books that are presumed to state principles of law that are unassailable, the following excerpt will indicate the measure of liability that attaches to a public officer who acts in this way:

"In order to the due administration of government, it is necessary that the officers who are charged with the various duties of making, interpreting, and administering the laws should enjoy a due measure of immunity from being called to account for their public acts at the instance of private parties. * * * And if individuals suffer detriment by reason of the laws enacted, they have no right of action against the members of the legislative body. 'It certainly cannot be argued,' says the court in Mississippi, 'that the motives of the members of a legislative assembly,

in voting for a particular law, can be inquired into, and its supporters be made personally liable, upon an allegation that they acted maliciously towards the person aggrieved by the passage of the law. And so, also, whenever the officers of a municipal corporation are vested with legislative powers, they hold and exercise them for the public good, and are clothed with all the immunities of government, and are exempt from all liability for their mistaken use, although they may be held responsible if shown to have acted corruptly. * * *

“A similar immunity protects the high officers of the executive department. They may be controlled in the performance of merely ministerial duties, involving the ascertained rights of individuals, by the process of the courts. But actions do not lie against them for damages sustained by private persons in consequence of their political or public acts. ‘Where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the President, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured has a right to resort to the laws of his country for a remedy.’” Black on Constitutional Law, sec. 9.

We cannot foresee what exigencies may arise before the loan is replaced by tax anticipation warrants duly issued against the taxes of 1929, but we are of the opinion that no serious predicament or personal liability can arise if there is a proper application of the funds in question for the benefit of the City and all City officers having to do with same act in good faith.

(No. 6269—September 6, 1928—L. H.)

1 RECEIVERS, DELINQUENT WATER BILLS, PROCEDURE.

In case water has been used prior to the taking over of possession by receivers or trustees, the proper practice is for them, upon notice to the City, to apply to the court by petition for leave to adjust and pay such water bills.

2 WATER RATES, DELINQUENT, NATURE.

Delinquent water rates are in the nature of a cause of action *in rem*.

Chicago Title & Trust Co., Chicago:

A short time ago you made a complaint about difficulties you were having concerning the payment of water bills for premises now occupied by you as receivers for certain companies that are under the control of the courts.

Upon inquiry we find that the difficulty lies in the fact that it has been the custom of your office, when such bills were received to strike out some portion of the bill which you do not see fit to pay and mail in a check for the net amount which you think you are liable for, irrespective of whether the discount period has expired or not. This, of course, could not be handled in this way in the Bureau of Water where they are bound to follow the ordinance with respect to the manner of making claims and charging them to the expense account where there is difficulty or dispute in regard to a bill.

The parts of the City ordinance which affect the situation read as follows:

“After the expiration of the time of payment specified hereinbefore for each of the districts, a list shall be compiled of those premises for which assessed rates and charges remain unpaid, and the water supply of the premises against which such rates and charges

remain so outstanding, shall be cut off by the department of public works. * * * In any situation where the shutting off of water service is liable to involve the city in litigation, or where the property involved is in the hands of a court, such shutting off may be postponed pending advice from the corporation counsel; or if such shutting off would be productive of public danger, or would create a pestilent situation, or would entail suffering by a great number of persons who are not liable for the payment of the delinquent bill, or where the premises involved are the property of the United States of America, of the State of Illinois, or of any of its political subdivisions, such shutting off may be withheld if in the judgment of the commissioner of public works the withholding of such shutting off best serves the interest of the City of Chicago.

“Where water rates and charges under assessed rates appear upon the records of the bureau of water as unpaid, and where claim shall have been made that the ownership of the property for which such rates and charges are unpaid has changed, by foreclosure or otherwise, and the new owner or owners disclaim responsibility for the payment of water rates and charges accumulated prior to the time of their acquiring ownership, it shall be the duty of the superintendent of water to require the new owner or owners to make affidavit as to the time of purchase, stating in such affidavit the date of the deed, the name of the grantor, and address if known, together with the record by book and page, as shown by the recorder's office in which such deed is recorded. When such affidavit, executed in a manner satisfactory to the superintendent of water, shall be presented, said superintendent shall accept payment of rates and charges beginning with the date of such new ownership as evidenced by said deed and affidavit, and shall transfer the unpaid rates and charges accumulated prior to such change in ownership to suspense account number 1, and shall proceed to collect the unpaid rates and charges from the person or persons liable therefor.” Secs. 4157 and 4158, Municipal Code of 1922.

You will see from the above that in a certain measure the claim against premises that are delinquent for water rates is in the nature of an action *in rem*. Mr. Ward, the Superintendent of the Bureau, states that although there are many cases where receivers and trustees disclaim liability for water used prior to their appointment and the taking over of the premises, he has no difficulty with them ordinarily because the matter is always brought up in court and due notice is given to the City so that its rights may be protected. Usually the procedure is a petition on the part of the receivers, administrators or other trustees for leave to pay the water bill upon notice to the City. We always send a representative and the matter is adjusted without difficulty.

Having in mind that there is no way in which Mr. Ward can charge off an item or a portion of a bill without special authority, you will undoubtedly see the reasonableness of his request that you follow the same procedure as the rest.

(No. 6270—September 7, 1928—L. H.)

PATENT INFRINGEMENT, INDEMNITY BOND, NOTICE.

The provision in a contractor's bond to keep and save the City harmless in case damages, etc., result from the contractor's infringement of a patent protects the City from liability if upon claim of infringement by the City is made, the City at once notifies the contractor of such claim with the request that the contractor defend the suit on behalf of the City.

Hon. Richard W. Wolfe, Commissioner of Public Works:

We are in receipt of your letter of recent date to which you attached copy of correspondence dealing with a claimed

infringement of patents in the purchase of material now being used in the construction of bridge floors. It would seem from this file of correspondence that parties who are furnishing this material are the Phillip Carey Manufacturing Company and that they have under date of August 24, 1928, written a letter addressed to the City of Chicago stating that they will guarantee against infringement and will defend the suits and protect the City and its contractors from any expense therewith, if the claim of the alleged patent results in litigation. You asked us to review this file of correspondence and if we considered that the City is not amply protected by the guarantee that we should direct a proper course in order to fully protect the City.

We have always assumed that the bond given by the contractor for City work and materials in which such contractors agree to "indemnify and to keep and save harmless the City of Chicago against all liabilities, judgments, costs, damages and expenses which may result on account of any infringement of any patent by reason of materials, machinery, devices or apparatus used in the performance of the contract," was sufficient to cover the situation and to protect the City if it was diligent in the matter. It has been our practice whenever we were informed of any claim of infringement being made, to prepare and send out notices to the contractor calling his attention to his obligation under his bond and requiring him to defend any suit instituted or to be instituted on account of such alleged infringement. So far as we know this has protected the City up to the present time except in cases where by reason of extraordinary circumstances the rights of the City have not been properly safeguarded.

With respect to the particular contractor that you name, we have no doubt that the letter of August 24, 1928, of

which you sent us a copy, would fix the liability on the contractor to respond in damages in case any are obtained from the City. The letter calls upon you to immediately forward any further letters that you have from the claimants in which infringement suits are threatened, and also calls upon you to at once notify the contractor of the bringing of any suit, and asks for authorization to the contractor's attorney to appear on behalf of the City and conduct the defense. Not only should this be done in the present instance as requested in this letter, but it should always be done. The likelihood of loss to the City will depend very largely on the diligence used. In other words, as soon as there is notice of any suit being started the contractor should be informed that it is incumbent on him to protect the City's interests and to defend such suit, thus following out the practice that has been in vogue for many years in such matters.

(No. 6271—September 7, 1928—L. H.)

SEWAGE DISPOSAL, CONTRACT BETWEEN CITY AND
SANITARY DISTRICT, BOARD OF LOCAL IMPROVE-
MENTS.

A contract between the Sanitary District of Chicago and the City which relieves the latter from the burden incident to the construction and maintenance of a sewage and drainage plant is not only valid but is desirable if the improvement can be made by the Sanitary District more expeditiously than by the Board of Local Improvements on account of the latter's lack of funds; and if the contract covers a portion of work which has to be done under the supervision of the Board of Local Improvements, the contract should provide that in case of conflict between the supervising officers of the Sanitary District and those of the Board of Local Improvements, the Commissioner of Public Works should have a decisive voice in the matter.

*Hon. Michael J. Faherty, President, Board of Local Im-
provements:*

We are in receipt of your letter of recent date wherein you call attention to a proposed contract with the Sanitary District of Chicago and state that you would like to have us pass on the legality of it.

This contract, as drafted tentatively, contemplates that the Sanitary District should do certain construction and maintenance work in connection with sewage and drainage disposal for the South Side district and the City confers certain grants and easements for the purpose. We were recently called upon by the Mayor's Sewage Commission to pass on the question whether such a contract could be legally entered into. We held, in substance, that the work and maintenance so to be undertaken was strictly within the delegated powers of the two municipalities, and that if

the City Council found such a contract desirable it could lawfully enter into same. For your information we attach a copy of this opinion, which perhaps covers the points you are in doubt about.

The precise question which you ask is whether or not by such a contract the Board of Local Improvements is surrendering to the Sanitary District a function which it should take care of itself.

We do not see any encroachment on the rights, powers and duties of the Board of Local Improvements in the plan outlined by the contract. It is designed to relieve the City of some of the burdens incident to the making of the improvements therein set forth. While we have nothing to do concerning the policy or advisability of entering into such a contract, it would seem proper for us to say that it would facilitate the work on much needed improvements because the means for financing them would be immediately at hand, whereas if the City were to do all the work without the assistance of the Sanitary District it would be some time before funds for the purpose would be available. Aside from that it would make no difference to the taxpayers whether one municipality or the other did the work—always provided the money for it was raised by general taxation. There may be some reason for having a larger portion done by special assessment in order to distribute the burden properly, but as to this we are not called upon to express an opinion.

We note that the engineers of your Board call attention to the fact that there is certain work that will have to be done under the supervision of the Board of Local Improvements even if this contract is entered into, and that unless the engineers of your Board are consulted with reference to certain matters there may be a conflict of opinion as to the plans to be followed which could be

avoided by having the Board of Local Improvements concur in matters to be determined (under the terms of the proposed contract) by the Commissioner of Public Works and the Chief Engineer of the Sanitary District. Such difference of opinion often is costly, and we are in accord with the recommendations made in the letter of your engineer, attached to your letter to us, wherein he suggests that the contract should provide for agreement of the Board of Local Improvements along with that of the two officers just mentioned.

Our recommendation is that when the ordinance authorizing the contract is printed, prior to its passage, amendments should be drawn to this effect substantially as indicated in the letter of your engineer. We will be ready to do this if request is made for same. These amendments can then be adopted when the ordinance comes up for final passage. By this means the Board of Local Improvements will be kept in touch with the situation, and no plans will be adopted which will interfere with plans of the Board of Local Improvements whether they relate to drainage, sewage disposal, or any other proposed local improvement.

We do not wish to be understood as intending, by this letter, to pass on certain criticisms or proposed modifications of the plans suggested by the letter of your engineer. Those are matters that do not involve legal questions and should be urged before and considered by those who have to do with the manner in which the proposed work is to be done.

(No. 6272—September 10, 1928—L. H.)

1 CONTRACTS IN EXCESS OF APPROPRIATIONS AND
EXTENDING BEYOND THE FISCAL YEAR, VALIDITY.

The City under section 4, article 7 of the Cities and Villages Act has the implied power in case of necessity to enter into a contract for a larger sum than the amount appropriated and extending into the subsequent year, provided it is stipulated that no greater sum than the amount appropriated should be expended by the City during the fiscal year.

2 CONTRACTS, APPROPRIATIONS, TRANSFER.

Until an appropriation is increased through transfer from other appropriations, a public officer in making contracts has no right to anticipate such action by the City Council.

Hon. George K. Schmidt, City Comptroller:

You forwarded to this office copy of a letter received by you from the law firm of McKinney, Lynde & Gear concerning an order passed by the City Council on July 11, 1928, with the request that we should advise you what steps to take in order to protect the City's interests. The order referred to appears at page 3349 of the Council Journal of July 11, 1928, and reads as follows:

“Ordered, That the Commissioner of Public Works be and he is hereby authorized and directed to expend not to exceed \$50,000.00 for preliminary work necessary in the development of the Calumet Harbor, from appropriation under Account 70-S-3 as the same may be hereafter revised by transfers of funds available in other appropriations of the Department of Public Works.”

On the same page of the Journal will be found another order of the Council rescinding an order passed on May 1, 1928, whereby the Commissioner of Public Works was

authorized to expend \$35,000 for the same purposes (surveys, preparation of plans and specifications) out of Account 336-S-1.

The appropriation mentioned in the order of May 1st was an appropriation from the Harbor Fund for Lake Calumet Harbor; the appropriation mentioned in the order of July 11th (Account 70-S-3) is an appropriation from the general corporate fund for services of engineers, accountants, investigators, etc., for a number of purposes, including railway terminals, Calumet Harbor and water terminals. This appropriation is for the sum of \$5,000 only.

From the above, it would seem that it was the intention of the City Council on July 11th to authorize expenditures for the purposes of Calumet Harbor to the extent of \$50,000 out of an appropriation for \$5,000.

Section 3 of article VII of the Cities and Villages Act contains the following provisions:

“Neither the city council nor the board of trustees nor any department or officer of the corporation shall add to the corporation expenditures in any one year anything over and above the amount provided for in the annual appropriation bill of that year, except as is herein otherwise specially provided, and no expenditure for an improvement to be paid for out of the general fund of the corporation shall exceed in any one year the amount provided for such improvement in the annual appropriation bill.”

In this connection it is also proper to note the following provision, contained in the section of the statute immediately following the one just quoted from:

“No contract shall be hereafter made by the city council or board of trustees, or any committee or member thereof; and no expense shall be incurred by any of the officers or departments of the corporation, whether the object of the expenditure shall have been ordered by the city council or board of trustees or

not, unless an appropriation shall have been previously made concerning such expense, except as herein otherwise expressly provided."

The Law Department has repeatedly been called upon to interpret the provisions of the statute above set forth. This department has consistently held, over a long period of years, that while there is no express authority contained in the statute for making a contract extending beyond and containing provisions for payments after the current year, yet the exigencies of the administration of the City's affairs are such that it is necessary sometimes that contracts shall cover periods running beyond the fiscal year in which they are executed; that, therefore, a common sense interpretation of the said provisions is that a contract may be entered into for a larger sum than the amount appropriated and extending into a subsequent year provided it is stipulated that no greater sum than the amount appropriated therefor shall be expended thereon by the City in any one year.

Manifestly, the Commissioner of Public Works cannot enter into a contract for the purpose stated in the order of July 11th, for a greater sum than \$5,000 unless there is inserted a provision to the effect that no more than such amount will be paid thereunder during the present fiscal year. This is true even though the Council indicated in the order of July 11th that there was a likelihood of augmenting the sum appropriated by the transfer of sums from other appropriations. Until this is done by proper action of the City Council the Commissioner of Public Works has no right to assume that it will be done.

We, therefore, beg to advise you that the Commissioner of Public Works is authorized, by the order of July 11th above quoted, to make expenditures for necessary preliminary work on the Calumet Harbor improvement to

the extent of \$5,000. He is also authorized to make contracts extending beyond the current fiscal year for an amount in excess of that, but not exceeding \$50,000, if he provides in the contracts that no greater sum than \$5,000 shall be paid thereon by the City in the current fiscal year and that payments beyond that sum shall only become a liability of the City when an appropriation in due form shall have been made therefor by the City Council.

The letter of the firm of attorneys mentioned above states that the order of July 11th is "unwarranted, illegal and unauthorized." We have written to these parties and asked them to let us know just what their position is in regard to this matter and what their point as to legality is, but up to the present time they have not informed us. We do not regard it as invalid, although it cannot be construed as giving authority to expend the full amount mentioned therein at the present time, but must be interpreted as we have indicated.

(No. 6273—September 10, 1928—L. H.)

1 PENSIONS, HOUSE OF CORRECTION, SALE OF OLD MATERIALS, 3 PER CENT, ETC.

Old materials received from the different departments by the House of Correction and improved or repaired by that institution, are, under section 2474 of the Municipal Code of 1922, regarded as a product of industry from the sale of which 3 per cent must be placed in the Pension Fund.

2 WORDS AND PHRASES.

The phrase "gross earnings" in section 1 of the House of Correction Employees' Pension Fund Act is, under section 2274 of the Municipal Code of 1922 to be regarded as the whole amount realized from the sale of old materials as they have been enhanced by repair or improvement.

Hon. James Curran, Secretary, House of Correction Employees' Pension Fund:

We are in receipt of your letter in which you ask us to give an interpretation of the clause of the Act providing for a pension fund for employees of the House of Correction which authorizes placing three per cent of the gross earnings of the House of Correction into the fund. The section of the Act in question reads as follows:

"That the board of inspectors of the various houses of correction, organized under an Act of General Assembly of the State of Illinois entitled, 'An Act to establish houses of correction and authorize the confinement of convicted persons therein,' approved April 25, 1871, and maintained thereunder in cities having a population exceeding 150,000 inhabitants, shall have power, and it shall be its duty to create a house of correction employees' pension fund which shall consist of two (2) per cent of the salary or wages of the employees, deducted in equal monthly installments from such salaries or wages at the regular time or times of the payment thereof, but not to exceed two

(2) dollars per month and three (3) per cent of the gross earnings of the house of correction, and three (3) per cent of the fines and costs collected for violation of city ordinances where the persons convicted of such violations have been incarcerated in the house of correction for the non-payment of such fines and costs." Cahill's Stat., 1927, chap. 67, par. 19, p. 1400.

It appears that there is a difference of opinion as to whether or not this contemplates placing three per cent of the receipts derived from the sale of old materials into the pension fund. The question, as we view it, is whether the whole amount realized for such old materials is to be regarded as "gross earnings" of the House of Correction, or whether only such amount as the handling of the old materials by the House of Correction enhances the value of same is to be so regarded.

You state in your letter that the House of Correction gathers all of the old material from the different City departments and hauls it to the House of Correction, where it is sorted and put in shape for sale at the best market prices. You look upon the receipts derived from the sale of this material as "gross earnings" within the meaning of the term as used in the statute.

We are informed that in many instances the materials thus collected are of greater value than mere junk, and that the work put upon same by the House of Correction is far from the whole value contained therein when sold. In other cases practically the whole value of the finished product is attributable to the work put on to same by the House of Correction.

In view of these facts, if there were nothing in either the statute or the ordinances of the City of Chicago putting a different aspect on the situation, we would be compelled to hold that the gross earnings of the House of Correction did not include the value of the materials taken

over for purposes of salvage or repair. It seems; however, that the City Council has acted in the matter by declaring that such materials, when changed and put into marketable form by the House of Correction, shall be considered "a product of an industry of the House of Correction."

The original ordinance to which we refer was passed on January 19, 1917, and appears in the Council Journal of that date at pages 2931-2. Section 2 of said ordinance reads as follows:

"That all personal property transferred to the House of Correction, as aforesaid, shall be considered as property of the House of Correction and that all said material after being taken over, arranged, classified or otherwise changed into marketable form shall be considered and is hereby declared to be a product of an industry of the House of Correction."

The said ordinance, in condensed form, was incorporated in the Chicago Municipal Code of 1922 as section 2274, which reads as follows:

"The city comptroller shall transfer to the house of correction all personal property which may be reported by the heads of the various departments of the City of Chicago as no longer usable by them; provided, that for all property so transferred the house of correction shall pay reasonable prices to be credited to appropriate revenue accounts. All personal property so transferred to the house of correction shall be considered the property of the house of correction, and all such material, after being taken over, arranged, classified or otherwise changed into marketable form, shall be considered and is hereby declared to be a product of an industry of the house of correction."

Inasmuch as the City Council has gone on record declaring that the said materials after being handled by the House of Correction shall be regarded as "a product

of an industry'' of said institution, such declaration being made after the passage of the statute which provides for placing three per cent of the gross earnings of the institution into the pension fund, we must assume that the City Council intended that three per cent of the sums realized from the sales of the materials should be placed in the pension fund.

(No. 6274—September 11, 1928—L. H.)

1 LICENSE REFUND, APPLICATION FOR LICENSE UNDER ASSUMED NAME.

Money accompanying an application under an assumed name for a coffee shop and soft drink parlor should be repaid to the applicant upon refusal to issue the license after investigation if the applicant can properly identify himself.

2 LICENSE REFUND, IDENTIFICATION OF APPLICANT NECESSARY.

The Comptroller should not refund license fees upon a mere affidavit of an applicant that he is the same party who paid the fees but he should require the City Collector to identify the applicant in writing or should make the refund under an order of court.

Hon. George K. Schmidt, City Comptroller:

We have before us a letter from the Deputy Comptroller making inquiry as to what should be done in the case of persons entitled to refunds where deposits were made under assumed names.

The letter states that applicants for coffee shop and soft drink licenses frequently make application at the City Collector's office under assumed names; that at the time

of making application they deposit the amount of the license fee, but the license cannot be issued until after a police investigation; that sometimes the police refuse to approve the application, and the license money should then be refunded; that the voucher comes to the Comptroller in the assumed name instead of the real name of the party entitled to the money; that when the applicants in such cases apply for their refunds they are unable to identify themselves under the assumed names.

The question asked is, "Will it be proper to refuse to refund the money, or should it be refunded upon an affidavit giving a true statement of the facts?"

The person who deposited the money in such case is unquestionably entitled to the return of same. The only question that presents itself is, how much evidence of identity will satisfy the Comptroller so that he may act without running any risk of paying the money to the wrong party?

If the City Collector can identify the party who deposited the money and will notify the Comptroller officially in writing, the Comptroller will be protected if he honors the voucher. If that is impracticable, the Comptroller may refuse to pay, on the ground that the owner of the fund has not been sufficiently identified, and the latter may then have recourse to a court proceeding, in which event, also, the Comptroller will be protected.

If the Comptroller seeks to protect himself by means of an affidavit he may do so, but he should bear in mind that such an affidavit if false will not subject the deponent to the pains and penalties of perjury. There is a certain moral influence that asserts itself when a party makes oath under such circumstances, but it is not an oath required by law and it is not an affidavit in a cause

pending in a court, and therefore has no greater standing in law than a solemn declaration that is not under oath. The Treasurer is protected against loss in such a case by a surety bond, but there is none authorized that protects the Comptroller.

We recommend that the City Collector should issue a receipt in such cases which authorizes a refund to the holder of the receipt. A corresponding clause in the application would prevent a successful claim being made for a second payment if the money was paid by the City's officers to the person who produced the receipt.

(No. 6275—September 11, 1928—L. H.)

1 BOND ISSUES, CURRENT EXPENSES, BRIDGE REPAIR AND MAINTENANCE.

The City Council has power to issue bonds for current expenses such as repair and maintenance of bridges but the ordinance for such bonds should be submitted to the voters for approval.

2 LAW DEPARTMENT, NATURE OF QUESTIONS HANDLED.

The Department of Law is not concerned with questions of "propriety" or the advisability of issuing bonds, etc., but only with their validity or legality.

Hon. Richard W. Wolfe, Commissioner of Public Works:

We have before us your letter of recent date originated by the City Bridge Engineer, in which you make inquiry concerning the propriety of a bond issue for the purpose of making certain alterations on bridges.

It appears that prior to the year 1918 City bridges were constructed with floor systems designed for maximum con-

centrated loads of 6,000 pounds; that since then there has been such a change in traffic conditions that the bridges built for such loads would be no longer serviceable without alterations that would bring them up to a standard sufficient for the greater weights now permitted thereon. You state that there are twenty of these bridges, and that the alterations contemplated thereon are not in the nature of repairs nor a matter of maintenance, but must be regarded as a reconstruction (in part) of the bridge structure, and as such properly a part of the capital cost of such structures. You ask the following question:

“Will you be good enough to let me have a legal opinion as to the propriety of issuing a bond issue in the amount of approximately \$1,750,000 to cover reconstruction of twenty bridge floors, so as to make the strength of these floors conform to the present ordinance governing traffic.”

The propriety of issuing bonds to take care of this expense is a matter entirely in the discretion of the City Council. The Council is not bound to make nice distinctions on the question of whether an expense is for a permanent improvement or not. It may even issue bonds for current expenses, such as repair and maintenance, if it sees fit to do so and the issue is approved by the voters.

In the case of *People ex rel. Carr v. Chicago & Northwestern R. Co.*, 308 Ill. 54, the question of the validity of bonds issued to meet current expenses of the municipality was before the court. It was contended that the City could only issue bonds for improvements of a permanent nature. But the court held otherwise. The court said, among other things:

“The power of the city to borrow money and to issue bonds therefor is conferred by the constitution of this State and by the statute. (Const. of 1870, art. 9, sec. 12; 1 Hurd’s Stat. 1921, clause 5, p. 326.) Where such power is conferred in general terms by

the constitution and the statute it is only subject to such limitation as is expressly made by law. (1 Dillon on Mun. Corp.—5th ed.—sec. 288, and authorities there cited.) The courts, as a rule, will not interfere with the legislative discretion as to making appropriations. (*People v. Village of Hyde Park*, 117 Ill. 462.) The city council is allowed a like discretion as the legislature of the State as to issuing such bonds. *People v. Bowman*, 253 Ill. 234.”

Thus, it will be seen that if the City Council sees fit to raise the money for this purpose by means of a bond issue there is no legal obstacle in the way. The ordinance authorizing the issuance of bonds would, of course, have to be submitted to the voters for approval. If so approved the bonds would be valid.

The question of the “propriety” of issuing bonds for this purpose includes the question of advisability, but that is something that we have nothing to do with. The Department of Law is concerned with the question of legality only, and others should pass on whether questions of good financing or consideration of economy enter into the matter.

(No. 6276—September 11, 1928—L. H.)

1 APPROPRIATIONS, EXPLOITATION AND EXPOSITIONS,
ADVERTISEMENT.

The City Charter of Chicago does not permit appropriations for advertisement for the purpose of exploitation and exposition, such a purpose not being corporate.

2 WORDS AND PHRASES.

The term "corporate purpose" does not include advertisement for the purpose of exploitation and exposition of the community.

Municipal League of Los Angeles, Los Angeles, California:

We are in receipt of a letter from your Mr. John Steven, Assistant Secretary of your organization, who states that your local and county governments annually appropriate sums of more than a million dollars for what is known as exploitation and exposition purposes. He says that these sums are spent in advertising the resources of the community, the purpose being to attract new industries and to increase tourists. He says you are interested to know whether any communities comparable to Los Angeles levy taxes for such purposes, and asks for such information as we can give you as to the amount of such expenditure and the manner in and purposes for which they are made.

There is no such expense appropriated for in this immediate jurisdiction and we know of no cities in Illinois that expend money for such purposes, therefore, we have no information which will be of any value to you.

So far as the City of Chicago is concerned, no authority is given to it to use money in this way. The expenditure for such purposes would not come within the meaning of "corporate purposes" as that expression is used in the

Charter Act. In fact, there is at the present time a suit pending in the Supreme Court of this State in which it is sought to enjoin the officers of the City of Chicago from paying a bill for advertising the desirability of voting for bond issues that were submitted to the voters at the election held on April 10th of this year. The proposed bond issues were designed for the financing of public improvements that would undoubtedly be of great value to the City and great convenience to the public, and some of them were already under way and the failure to approve the bond issues meant a stoppage of the work. The City officers deemed it within their powers to insert advertisements in the papers recommending the approval of these ordinances by the voters without which the bonds could not be issued. You will therefore see that the lines are drawn strictly in this State and we have no means of appropriating money for purposes of exploitation and exposition.

(No. 6277—September 12, 1928—L. H.)

1 TAX ANTICIPATION WARRANTS, EXTENT OF ISSUE.

Tax anticipation warrants may be issued to the extent of 75 per cent of the total amount of any taxes levied by the City Council.

2 TAX ANTICIPATION WARRANTS, ISSUE PERMISSIBLE.

In September, 1928, there was an unexercised borrowing power of \$3,750,000 on basis of the 1928 tax levy; which added to the unencumbered borrowing power of \$7,643,062.50 on the 1927 tax levy make a total of \$11,393,062.50 available for tax anticipation warrants.

3 SURPLUS FUNDS, LOANS FROM, TAX ANTICIPATION WARRANTS AS SECURITY.

The City Council has power by ordinance to direct the making of a loan from the surplus funds in the hands of the Treasurer upon receipt of tax anticipation warrants to cover such a loan for an amount within the limit of 75 per cent of the total amount of taxes levied and unencumbered.

4 WORDS AND PHRASES.

"Total amount of any such tax levied" in section 2 of the Tax Anticipation Warrants Act means the tax levied by the City Council.

Hon. George K. Schmidt, City Comptroller:

You have asked us to give you an opinion with respect to the extent of the power of the City at the present time to issue tax anticipation warrants for purposes of the general corporate fund taking into account the amount of such warrants now outstanding.

The statute under which such warrants may be issued gives authority to issue same to the extent of 75 per centum of the total amount of any such tax levied. Cahill's Stat., 1927, p. 2494.

Although the language of the statute seems plain, a question has often been raised as to just what is meant by the words "total amount of any such tax levied." The Law Department has been called upon several times to give its interpretation, and has consistently held that the amount of the tax levied by the City Council is what controls the matter. See *Opinions of Corporation Counsel and Assistants*, 1916, p. 196; *Id.*, 1919, pp. 53, 259.

As applied to the situation confronting the City at the present time, it appears that the tax levy for the year 1928 is in excess of \$51,000,000, and that such warrants have been issued to the extent of \$34,500,000. There remains, therefore, an unexercised borrowing power of \$3,750,000 or more.

With respect to the levy for the year 1927, we are informed that there remains a balance of \$13,190,750 to be accounted for by the County Collector for taxes actually levied for that year. This, we are told, is encumbered by 1927 tax anticipation warrants to the extent of \$3,000,000, leaving an unencumbered balance of \$10,190,750. Since you are authorized by law to issue up to three-fourths of any taxes already levied, you have the right to encumber this \$13,190,750 at the present moment up to \$9,893,062.50 — \$6,893,062.50 more than at present outstanding. If the \$3,000,000 that are now outstanding are paid within the next few days by the use of collections about to be paid, as is rumored, you would then have the right to issue against the remaining \$10,190,750 warrants amounting to \$7,643,062.50.

At the meeting of the Finance Committee held September 11th it was suggested that there was a possibility that the banks would not buy these additional warrants if issued. This may be true, but the warrants could be lawfully issued and offered to the banks. If the banks

decline them it would still be possible to realize on them by borrowing from *surplus funds* in the hands of the City Treasurer. By accepting such lawful warrants duly issued in accordance with an ordinance directing a loan from such surplus funds, the City Treasurer complies with the law and runs no risk of doing anything contrary to law, as he would do if he loaned from such surplus funds on security not authorized by law such as an indebtedness certificate or due bill even if directed by the City Council.

Inasmuch as there is now before the Committee on Finance a proposition to borrow from surplus funds in the treasury \$12,000,000 on a promise to give anticipation warrants against the taxes of 1929 as soon as they can be lawfully issued, which procedure would be contrary to law, we recommend that the issuance of legal warrants against the taxes of 1927 and 1928, as above outlined, should be resorted to in preference to the proposed unlawful procedure which subjects the officers of the City to unnecessary risk.

(No. 6278—September 12, 1928—G. F. M.)

1 PENSION BOARD, CONSTRUCTION OF PENSION ACT, POLICY.

The construction placed by a former Pension Board upon an entirely different Pension Act is conclusive upon a succeeding Pension Board.

2 POLICE PENSIONS, CLAIMS, STATUTE OF LIMITATIONS.

An application for a pension under the Police Pension Fund Act of 1915 (Smith's Stat., 1927, p. 525, sec. 6) must be made within one year from the retirement or death upon which the application is based and a claim made eight years after retirement is not only barred by said Pension Act but is also barred by the Five Year Statute of Limitations.

Retirement Board, Policemen's Annuity and Benefit Fund:

Complying with your request for an opinion as to the right of George E. Friend to disability benefit for the period of September 22, 1920, to and including January 12, 1921, the following is submitted:

Your letter states that a copy of the accident report dated September 15, 1920, shows that George E. Friend was injured on September 7, 1920, while tapping wires for the Detective Bureau; that he has filed an affidavit to the effect that he was paid a salary up to and including September 21, 1920, but did not receive either pay or disability pension for the period from September 22, 1920, to and including January 12, 1921; that his disability pension started on January 13, 1920; that a letter from the City Comptroller under date of March 9, 1928, states that Friend's name did not appear on the First District payroll for the months of October, November, December, 1920, or January, 1921; that Mr. Harry Pfau, former Secretary of the then Pension Board, stated that it was

the policy of the Pension Board not to pay disability pensions to persons who were working, no matter where employed, nor to grant disability pension to anyone who was working; that Mr. Friend was working from September 22, 1920, to January 12, 1921, being employed by a man named Breuseaux.

At the time Mr. Friend applied for disability pension, there was in force and effect in the City of Chicago, the Police Pension Fund Act of 1915, as amended in 1917, which Act was then being administered by a Board of Trustees selected in accordance with the terms of that Act. It appears from the application of Mr. Friend that the said application was filed on September 22, 1920, so that his present application is not a new application for the grant of a pension from September 22, 1920, to January 12, 1921, but is an application to have paid to him certain moneys which he claims should have been paid to him in January, 1921, after his application for pension had then been allowed. In other words, this is an application by Mr. Friend to have paid to him certain moneys which were due to him in 1920, and for which he has waited eight (8) years to apply, and the payment of which was refused by a former Pension Board because of a certain policy of procedure adopted by that Board.

Your Honorable Body has no power to override a policy adopted by a former Pension Board administering an entirely different Act, nor has your Honorable Body the right to pay money claimed to have been due for more than five years.

Section 15 of the Statute of Limitations of the State of Illinois (Smith's Stat., 1927, p. 1745) requires that actions to recover a debt must be brought within five (5) years from the time the cause of action accrued.

Mr. Friend was not paid any disability pension for the period in question under the policy of administering the Act followed by the then Board of Trustees empowered to administer the Act. But, if Mr. Friend did have or claim to have any right to such pension payments for the period mentioned under his original application, it became a debt due to him from the old Pension Board from and after January 13, 1921, and cannot now be recovered because of the Statute of Limitations hereinabove referred to specifically providing that action to recover on a debt must be brought within five (5) years. It is not within the power of your Honorable Body, as trustees, to waive the requirements of the Statute of Limitations.

If the present application of Mr. Friend is to be considered as an application for a pension for the period September 22, 1920, to January 12th, inclusive, 1921, then your Honorable Body is without power to grant same for the reason that section 6 of the Police Pension Act of 1915 as amended in 1917, specifically provides that no pension shall be granted to any policeman unless an application is filed with the Pension Board within one year from and after the date of the retirement of such policeman. As this present application is filed practically eight (8) years after the retirement of Mr. Friend, it cannot be considered by your Honorable Body.

I am of the opinion that your Honorable Body has no power to pay to George E. Friend, nor is he now entitled to receive out of the present Pension Fund, any moneys claimed by him to be due under the 1915 Pension Act for the period in question.

(No. 6279—September 20, 1928—H. B. R.)

1 TELEPHONE RATES, SINGLE MESSAGE.

The maximum length of time under present ordinance is five minutes on the basis of five cents per message, which rate was continued until May 27, 1923, or a period of five years from May 26, 1918; since which time no other ordinance has been passed.

2 TELEPHONE RATES AND SERVICE, CITY COUNCIL, POWER.

The City Council, in the first instance, has power to determine and fix telephone rates. If the City Council takes no action, then the Illinois Commerce Commission may establish reasonable rates. Upon failure of either City or Illinois Commerce Commission to establish rates, the Telephone Company may adopt and enforce reasonable rules and regulations for its service. Present rates appear to be governed by virtue of regulations made by the Telephone Company.

Dr. Morris Meyerowitz, Chicago:

I have at hand your letter of September 28, 1928, inquiring whether or not the Chicago Telephone Company has the right to limit the use of the telephone in the City of Chicago to five minutes and to charge an additional five cents for each subsequent five minutes.

The ordinance regulating the terms and conditions upon which the Chicago Telephone Company may operate within the City of Chicago was passed on November 6, 1907, and accepted by the Chicago Telephone Company. In accordance with the terms of said ordinance the City Council took up the question of the regulation of rates and enacted an amendatory ordinance, covering the question of rates, on May 26, 1913. This amendatory ordinance covers your precise question and under paragraph (H) relative to neighborhood exchange service, being a

paragraph of section 2 of the Telephone Ordinance of May 26, 1913, reads as follows:

“Any such exchange (meaning neighborhood exchange), may communicate with *any telephone* located within the city limits outside of the local or neighborhood exchange and served by any of the exchanges of the company located within the City of Chicago by a message for which a charge of not more than five cents may be made for each period of five minutes or fraction thereof.”

You will observe, by reading this provision, that it is clearly the intention to establish a unit of conversation and that the maximum length of time is five minutes on a basis of a charge of five cents a message. The specific requirement, however, of the ordinance is that the rates fixed by an amendatory ordinance, accepted by the company, shall continue for a period of not less than nor more than five years and that it would be necessary under this ordinance to enact an amendatory ordinance fixing telephone rates for the ensuing five years following May 26, 1918. This, however, has not been done by the City Council.

In the absence of any action taken by the City Council, the Illinois Commerce Commission can fix and determine reasonable telephone rates; and in the absence of any action on the part of the City or the Commission in my opinion the Telephone Company may adopt and enforce reasonable rules and regulations, with which subscribers agree to comply, in the use of its service in order that all may receive reasonable service.

(No. 6280—September 21, 1928—L. H.)

1 WHITE PAVING COMPANY CONTRACT, SETTLEMENT
ORDINANCE VALID.

The ordinance of August 6, 1928, authorizing certain City officers to obtain the release from and cancellation of contract of March 5, 1928, with the White Paving Company upon the payment to it of \$275,000 and in addition not to exceed \$27,000 to cover certain overhead expenses is valid.

2 OFFICERS, LEGISLATIVE DIRECTION MUST BE FOLLOWED.

An executive officer of the municipality is without power to substitute his own idea of what should be done in a matter upon which the City Council has acted and indicated the course to be pursued.

3 COMPROMISE, CITY COUNCIL, POWER.

The City Council by virtue of the power to control the finances of the Corporation (Cl. 1, sec. 1, art. 5, Cities and Villages Act) has the implied authority to adjust and compromise disputed claims against the City.

4 MUNICIPAL CONTRACTS, ANNULMENT.

Courts will not inquire into the motive nor the wisdom nor the expediency of legislative bodies and will not therefore interfere with the discretion of such bodies as to the necessity for certain work, if for a corporate purpose, its price, and the manner in which the work is to be performed. A court will interfere only in case the City Council has exceeded its powers or where there is fraud in the letting of a contract.

Hon. Richard W. Wolfe, Commissioner of Public Works:

We are in receipt of your letter of recent date in which you ask us to advise you with respect to your obligations and responsibilities in the matter of the payment of the sum of \$275,000 to the White Paving Company pursuant to the ordinance directing such payment passed on August 6, 1928. (Council Journal, p. 3440.) The proposed pay-

ment is for labor and materials for paving repairs under a contract between the City and said company, and is designed as a part of a compromise settlement to be made whereby the contract is to be cancelled and the City released from further obligation thereunder.

The City Council on March 5, 1928 (Council Journal; p. 2335), authorized the Commissioner of Public Works to enter into a contract for street repair work for that portion of the City lying north of Madison street described in said ordinance. The ordinance directed that this work should be done by private contract and specified certain things to be done in connection with the letting of the contract, such things, however, being in addition to and not in conflict with the general provisions of the Chicago Code of 1922 relating to the letting of contracts.

It appears that such a contract was let soon thereafter, with all due formality, to the White Paving Company. The contract was estimated to amount to approximately \$1,400,000. The contractor began work under the contract and performed a large amount of work, claiming to be entitled to about \$368,000 according to the terms of the contract. Soon after work was begun under the said contract a taxpayer's suit was instituted in the Circuit Court of Cook County alleging that there was fraud in the letting of the contract, that the prices fixed therein to be paid to the contractor were grossly excessive, and making other charges. The purpose of the suit was to obtain an injunction restraining the City and the contractor from carrying out the terms of the contract and enjoining the City's officers from paying out any money thereunder.

While no order of injunction has been entered in said suit and a motion for a temporary restraining order was denied by the court, the filing of the suit and the court

proceedings, coupled with bold threats on the part of the instigators of said suit to hold the officers of the City personally liable, resulted in a great deal of publicity and caused some of the City's officers to feel an uncertainty as to their duties and liabilities.

Among other things that occurred was the refusal of the Commissioner of Public Works to approve any vouchers for work, labor or material furnished or performed under the contract unless an indemnifying bond was given to secure him against loss.

In order to avoid the continued onslaughts on the good name of the City's officers a proposition looking to the cancellation of the contract and a compromise settlement for work already done was taken up, with the result that an ordinance authorizing such an adjustment was passed on August 6, 1928. (See Council Journal, pp. 3440-41.) By this last mentioned ordinance it is provided that "in order to settle and adjust the controversy and dispute between the City of Chicago and the White Paving Company" the Commissioner of Public Works is ordered and directed to enter into an agreement with White Paving Company, on behalf of the City of Chicago, whereby the contract originally entered into should be cancelled and the City should be released from any and all claims, for damages by reason of its failure to carry out the provisions and terms of the said contract. It is further provided by said last mentioned ordinance that, "in consideration of the cancellation of said contract and the execution of such release, and for the purpose of compromising and settling of disputes and claims for damages arising out of said contract," the Commissioner of Public Works is ordered to approve a voucher in favor of the White Paving Company for the payment of \$275,000 plus the reasonable cost of any special equipment and reason-

able expenses for overhead incurred by the company on account of such contract, but not to exceed the sum of \$27,000. This voucher was to be for an initial payment, and the City Comptroller and City Treasurer are ordered and directed to pay it. The balance claimed by the White Paving Company, by the terms of the ordinance, is to be adjusted by arbitration in the manner prescribed by the ordinance.

After the passage of the ordinance of August 6, 1928, it was still insisted by the parties who had instigated the suit that the proposed settlement was a fraud on the taxpayers, and there was further publicity given to charges and threats designed to reflect on and to intimidate the officers of the City. The attitude of the parties making these charges resulted in so much unpleasantness that an effort was made by the Corporation Counsel to put an end to it by going before the court in which the suit was pending for the purpose of securing either an authoritative order with respect to the proposed settlement or the advice of the judge as to the manner of proceeding in the making of the proposed settlement. It was believed that such word from the judge would set at rest the charge that the City's officers were trying to perpetrate a fraud on the taxpayers. The judge found it impracticable, however, to enter any kind of an order that would settle the controversy, or to give any advice that would have the effect of creating a better feeling on the part of the unfriendly parties. These efforts having failed, it is therefore incumbent on the City's officers to carry out the lawful orders of the City Council in accordance with the terms of ordinances duly passed, and to take the responsibility for action which their official positions impose upon them.

With respect to the ordinance authorizing the contract and the contract entered into in pursuance thereof, nothing has come to our notice that causes us to feel otherwise than that the ordinance was within the delegated powers of the Council and was a lawful exercise of such authority, and the contract was duly authorized and entered into in strict conformity with the law governing the situation. Hence, the City entered into a lawful contract which it is bound to carry out unless released by the consent of the contractor or a default of some kind on the part of the contractor. Under its power "to control the finances and property of the corporation" the City Council may enter into any contract that it sees fit, on behalf of the City, provided the contract is for a corporate purpose and is not *ultra vires* or beyond the powers which are given to the City by its charter. There are certain limitations and restrictions with regard to the manner in which this power is to be exercised, but if it is exercised in the manner provided by law its action cannot properly be set aside by a court. In other words, the sole discretion as to the necessity for the work or materials, the price, the manner in which it is to be done or furnished, and the means of payment therefor, is lodged in the City Council.

Our Supreme Court has gone so far as to hold that courts have not even the right to inquire into the motives of the Council in such cases.

"This court has repeatedly held that courts have no right to inquire into the motives of a legislative body nor into the wisdom or expediency of legislative acts. The authority of the courts is limited to an investigation of the question whether the legislative acts are beyond the scope of the legislative power. It is presumed that public officials act honestly and patriotically and discharge their duty to the public." *People ex rel. Shaner v. C., B. & Q. R. Co.*, 314 Ill. 445.

To the same effect:

“When the power to act is vested in the legislative department and the means it chooses are reasonably calculated to subserve the exercise of the power, courts will not inquire whether the legislature in delegating the power, or the subordinate legislative body selected to exercise it, acted wisely or not, and such action cannot be set aside by the court on the ground that it is unreasonable, as it is not the province of the court to pass on the reasonableness of an act of the General Assembly. (*Catholic Bishop of Chicago v. Village of Palos Park, supra.*) Neither has the court a right to inquire into the motives of a legislative body in vacating a street or alley or into the wisdom of expediency of the legislative action. The authority of the court is limited to an investigation of the question whether the legislative acts are beyond the scope of the legislative power.” *People ex rel. Franchere v. City of Chicago*, 321 Ill. 466-478.

The Council may direct the executive officers of the City to do the actual letting of the contract, but only in conformity with an ordinance or ordinances passed by it. A court can only interfere if the Council has exceeded its powers or there is fraud in connection with the letting of the contract.

The City, being bound by the contract, must pay for the work and material furnished. If the amount claimed is excessive, that is subject to adjustment through the medium of a suit or otherwise. But whether the amount claimed is excessive or not, the claim can be lawfully adjusted by the City Council. Nothing is more firmly established than the principle that the Council has the right to adjust claims against the City.

“Growing out of its authority to create debts and incur liabilities, a municipal corporation has power to settle disputed claims against it, and an agreement to pay these is not void for want of consideration. If it has obtained a contract which, by mistake or a change of circumstances, it deems to operate oppres-

ively upon the other party, an agreement to make an additional compensation, or to modify or annul it, is not in the absence of special restriction invalid for want of consideration. A town may make a contract with a creditor whereby the latter agrees to discount or throw off a portion of his debt, and such an agreement, if founded on a sufficient consideration, will be enforced." Dillon on Municipal Corporations, 5th ed., sec. 821.

The same author adds to the above the following in regard to the adjustment of disputed claims:

"As a general proposition, municipal corporations have, unless specially restricted, the same powers to liquidate claims and indebtedness that natural persons have, and from that source proceeds *power to adjust all disputed claims*, and when the amount is ascertained to pay the same as other indebtedness."

At the time the Ordinance of August 6, 1928, was passed the City was actually in default and guilty of a breach of the contract, by reason of the fact that it was performing some of the work by day labor that had been contracted for with the White Paving Company. There is no question but that there was an unliquidated claim against the City that the City was liable for to such extent as should ultimately be determined. This being true, the matter was one that the City Council had the right to adjust. It did undertake to adjust it by the passage of an ordinance authorizing the City's officers to make a settlement of the controversy on certain terms, as set forth in the Ordinance of August 6, 1928. A part of the proposed adjustment was the payment to the contractor of a fixed sum of \$275,000 (with certain additions)—in consideration of the cancellation of the contract by the contractor.

That the City Council had the authority to do this is clearly established not only by the authorities above cited

but by many others construing the express statutory enactment which gives the Council the power to control the finances of the corporation.

Technically, it is within your power as Commissioner of Public Works, under and by virtue of the direction contained in said ordinance, to approve a voucher at once for the payment of \$275,000 as the initial act in the program for settlement, without waiting for any other adjustment. We are disposed to hold, however, that the Council intended that you should secure an agreement to cancel the contract and a release of claims for damages before or at the time of turning over such a voucher, also that there should be included in the voucher a sum to be agreed upon and satisfactory to you for reasonable expenses of overhead and special equipment. The discretion is lodged in you to determine the reasonableness of this additional amount. If you are satisfied that the amount you agree upon is reasonable, you would have no occasion for submitting it to the City Council for approval. But if you cannot agree on an amount that you regard as reasonable and proper it would be wise to submit the matter to the Council for more explicit directions as to this smaller payment.

To the extent that we have indicated—that is to say, for the sum of \$275,000—you are now in a position, and it is your duty, to draw a voucher and approve it for payment, provided the White Paving Company agrees to give its release and cancellation, as per the Ordinance of August 6, 1928. You would not be justified in substituting any other plan, or your own idea of what should be done, in place of the direct mandate of the City Council, since the Council is the body that has the sole power to make the adjustment.

We therefore recommend that you procure the agreement of the White Paving Company by which it cancels the contract and agrees to the other terms contained in the Ordinance of August 6, 1928, and that you thereupon turn over to said company a voucher duly approved either for the sum of \$275,000 and such additional sum as you can agree upon, or for the sum of \$275,000 with the understanding that the other item is to be adjusted by further action of the City Council. In order to facilitate the transaction we have prepared a short form or agreement that may be used. If such form is not satisfactory we will endeavor to alter same to meet the situation.

(No. 6281—September 21, 1928—G. F. M.)

1 MUNICIPAL PENSIONS, TRUSTEES, TEMPORARY EMPLOYMENT DOES NOT DISQUALIFY.

A municipal employee in good standing is not disqualified from the position of trustee by working for the City under temporary authority in any other capacity.

2 MUNICIPAL PENSIONS, EMPLOYEE'S STANDING AND STATUS.

A municipal employee is in good standing if he is on the Civil Service Roll for reappointment and continues his contributions into the Pension Fund, his status being unaffected by leave of absence and employment elsewhere temporarily whether by the City or by others.

Retirement Board, Municipal Employees' Annuity and Benefit Fund:

Replying to your request for an opinion as to the right of a municipal employee who is on leave of absence, but

who is working for the City under "temporary authority," to become a candidate for Trustee of the Municipal Employees' Annuity and Benefit Fund, the following is submitted:

Section 2 of the Municipal Employees' Annuity and Benefit Fund Act provides for the election of members of the Retirement Board who shall be "Municipal employees employed by such City or the Board of Education of such City."

The rules governing the election of Trustee, as adopted by your Honorable Body, provide that any municipal employee in good standing is eligible as a candidate for the office as Trustee.

Section 12 of the Municipal Employees' Annuity and Benefit Fund Act defines a "municipal employee" as "any person who was, is, or shall be employed by such City or the Board of Education of such City and who has been or who shall be appointed to his position in the service of such City or Board of Education under and by virtue of" the Civil Service Act, and also "any person employed by such City or the Board of Education of such City who was appointed to the service of such City or Board of Education prior to the date upon which the said Act (Civil Service Act) shall have come into force and effect in such City."

Section 51 of the Act provides that in computing the term of service rendered by any municipal employee subsequent to December 31, 1922, any period of leave of absence without pay not longer than ninety (90) days shall be counted as a period of service for annuity purposes.

It is apparent from the above sections of the Act that any municipal employee who has been appointed to his position by virtue of the Civil Service Act, or who was

appointed to his position prior to the Civil Service Act, and who is on leave of absence is still a "municipal employee" within the meaning of the Act, since he is even entitled to a service credit for annuity purposes while on such leave of absence. Such municipal employee therefore comes within the definition of a "municipal employee employed by such City or by such Board of Education" required for eligibility to membership on the Retirement Board by section 2 of the Act.

A municipal employee on leave of absence who is on the civil service roll for reappointment to his position in the City service and who continues his contributions into the fund as required by the Act, comes within the definition of a "municipal employee in good standing" as required by your election rules.

As to the status of a municipal employee who is working under temporary authority in a position to which he is not eligible to appointment by virtue of civil service, while such employment gives him no rights under the Act so far as that particular employment is concerned, neither is there anything in the Act which deprives him of his status as "a municipal employee on leave of absence." Whether he is working for the City under temporary authority or working for a stranger is immaterial and does not affect his original status as "a municipal employee on leave of absence."

I am of the opinion that a municipal employee who is on leave of absence but who is otherwise in good standing with the fund is eligible to become a candidate for the position of Trustee without regard to whether or not he is at that time working for the City in another capacity under temporary authority.

(No. 6282—September 22, 1928—G. F. M.)

1 MUNICIPAL EMPLOYEES' PENSIONS, SEVERAL PERIODS OF LEAVE OF ABSENCE.

In computing the term of service rendered by a municipal employee, as many ninety day periods of leave of absence should be counted and credited to an employee as he is actually on leave of absence, regardless of the number of times he obtains leave.

2 MUNICIPAL EMPLOYEES' ANNUITY AND BENEFIT FUND ACT.

Section 51 of the Municipal Employees' Annuity and Benefit Fund Act does not limit to one credit period of leave of absence, but as many periods of leave of absence may be credited to an employee as he is actually absent, provided the period credited is not over ninety days in each case.

Retirement Board, Municipal Employees' Annuity and Benefit Fund:

Replying to your request for an opinion as to the service credit rights of an employee on leave of absence, the following is submitted:

Your letter states that Mr. John M. Kelly, an employee of the City of Chicago, worked as a civil service employee in his regular civil service position from the date of his appointment up to November 10, 1920; that he was granted a leave of absence for one year from November 10, 1920, and appointed Secretary to the Mayor on November 11, 1920; that his leave of absence was extended one year from November 10, 1921; extended six months from November 10, 1922; extended one year from May 10, 1923; and has been extended each year on May 10th for an additional year up to the present time; that during these years Mr. Kelly has been acting as Secretary to the Mayor.

Your question is as to whether or not credit for service during a leave of absence for a period not longer than 90 days is confined to one period of leave of absence or whether an employee is entitled to like credit for each succeeding period of leave of absence.

Section 51 of the Municipal Employees' Annuity and Benefit Fund Act of 1921 provides that in computing the term of service rendered by a municipal employee subsequent to December 31, 1921, any period of leave of absence without pay, not longer than 90 days, shall be counted as a period of service for annuity purposes. Each renewal of Mr. Kelly's leave of absence constituted a new grant of leave of absence for the period of time of the renewal, as no one grant of leave of absence was in excess of one year.

I am of the opinion that Mr. Kelly is entitled to have counted as periods of service for annuity purposes, ninety days of the first year's leave of absence, ninety days for the second year's leave of absence, ninety days for the six months' leave of absence and ninety days for each year or separate period of leave of absence thereafter.

I am of the further opinion that an employee is not limited to a service credit of only one period of ninety days during a continuing leave of absence but is entitled to credit, as periods of service for annuity purposes, to ninety days during each period of leave of absence where such leave is for ninety days or longer, irrespective of the number of leaves or extensions of leave granted in any one year or series of years.

(No. 6283—September 25, 1928—F. A. B.)

1 MOTOR BUSES, AS FEEDERS, OPERATION BY CHICAGO RAILWAYS COMPANY NOT PERMISSIBLE.

The Chicago Railways Company under its present charter has no power or authority to operate and maintain motor buses in the streets of the City of Chicago, either independently or as so-called feeder buses to its system of street railways.

2 MOTOR BUSES, REGULATION, ILLINOIS COMMERCE COMMISSION.

The Illinois Commerce Commission, and not the City of Chicago, under present law has the right to regulate the use and operation of motor buses upon the streets and highways of the City of Chicago.

3 ORDINANCES.

Provision against extension of term of franchise, estoppel, etc., form.

To the Honorable, the City Council of the City of Chicago:

I have been requested by the Corporation Counsel to render an opinion to you as to the power of the City of Chicago to grant unto the Chicago Railway Company, its successors and assigns, and its receivers, the right "to establish motor bus lines" on certain streets of the City of Chicago which shall constitute "an extension of and auxiliary and supplementary to the existing system of street railways of said Chicago Railway Company and to maintain and operate said motor bus lines as a part of said railway system."

This to you gentlemen is not a new question, for at the request of the Honorable U. S. Schwartz, Chairman, Local Transportation Committee, on July 2, 1924, the then Corporation Counsel, Francis X. Busch, rendered an opinion

upon this same question, wherein he states, among other things:

“The Chicago Railways Company was incorporated in 1903 under and in accordance with the provision of ‘An Act concerning Corporations,’ approved April 18, 1872, and in force July 1, 1872, and all acts amendatory thereof; in other words, under the general incorporation laws of the State of Illinois as then or thereafter existing. The charter of the company declares the purpose of its organization as follows:

‘The object for which it (the company) is formed is to construct, own, purchase, lease or otherwise acquire street railroads in the City of Chicago and in the Counties of Cook, Lake, McHenry, DuPage and Will in the State of Illinois and to operate the said railroads owned, leased or otherwise acquired by it with animal, cable, electric or other power authorized by law and to own and enjoy all real and personal property necessary or proper for the prosecution of the business aforesaid.’

* * * we are of the opinion that the operation of motor buses by said company in the manner contemplated by the Bowler order would be *ultra vires* of the corporate powers of the company and therefore illegal. * * *

“Should the companies desire to operate such motor bus lines, they must first cause their charter powers to be amended in such manner as to supply the corporate authority now lacking. Thereafter, before installing and operating such motor bus lines or any of them, it would be necessary for the companies to apply for and receive a certificate of convenience and necessity from the Illinois Commerce Commission for each such motor bus line, and also permission and authority by general or special ordinance from the City Council for the use of all or any streets over which such motor bus lines were to be operated.”

Notwithstanding this opinion, however, which has heretofore been submitted to you by Mr. Busch, and upon which you apparently for a number of years have relied and acted, I have made an independent investigation of

the law in reference to the subject of the inquiry, and I find that under the charter of the Chicago Railways Company it has no power or authority to operate and maintain buses in the City of Chicago, either independently or as so-called feeder buses to its system of street railways. The fact that these buses are to be operated in connection with the existing system of street railways in the City of Chicago does not in any manner give the corporation power under its charter to own and operate these buses. *Attorney General v. London Co.*, L. R. (1901), 1 Ch. Div. 781, affirmed L. R. (1902), Appellate Cas., pp. 165-169; *Hoogland v. Hannibal Railway*, 39 Mo. 451; *Wiswall v. G. & R. P. R. Co.*, 3 Jones Eq. 183; *Downey v. Mt. Washington R. R. Co.*, 40 N. H. 420; *Pearce v. M. & Ind. R. R. Co.*, 21 How. 441; Motor Vehicle Act, Hurd's Stat., 1916, chap. 121, par. 269-a.

The Supreme Court of Illinois, in an opinion rendered June 23, 1928, in the case of the *Chicago Motor Coach Company v. City of Chicago*, held on the question directly presented to it (exclusive of the use of said motor buses as extensions of and auxiliary and supplementary to existing systems of street railways) that the City Council has no power to grant the right to operate, or to regulate the use of motor buses in the City of Chicago, but that such power was vested exclusively by the Legislature in the Illinois Commerce Commission. In that case the City of Chicago passed an ordinance providing that:

"It shall be unlawful for any person, firm or corporation to operate motor buses as common carriers on any street or public highway in the City of Chicago without first having obtained a specific grant of authority to do so from the city council in the form of an ordinance designating the routes and fixing the terms and conditions under which such buses may be operated."

The Supreme Court held that the City Council did not possess the power to enact the ordinance in question and that the ordinance was void. The court in so holding said:

“The whole subject of motor vehicle operation upon streets and highways being under the control of the State, and the legislature having failed to vest in the city authority to license such vehicles or give it power to act when extraordinary conditions intervene, it possesses no such power. * * *

“It is contended by appellees that notwithstanding the powers of the Commerce Commission have superseded many of those formerly vested in the city council, yet the decisions proceed on the assumption that the city ‘has retained its fundamental power.’ They say if this were not so, there would be no occasion to consider the relative rights of the municipality and the commission in those cases. But the reason assigned begs the question. If the state has conferred exclusive power on its agent, the Commission, to grant the right to operate buses in its highways, including streets, and if that power supersedes the power of cities to occupy the same field of regulation, it is obvious no residue of power with regard thereto remains in the city.”

In the above case the court, in quoting from the case of *City of Will v. Cleveland, Cincinnati, Chicago and St. Louis Ry. Co.*, 324 Ill. 494, said that the General Assembly by an act entitled “An Act concerning public utilities,” approved June 29, 1921, in force July 1, 1921 (Laws 1921, p. 702), created the Illinois Commerce Commission—

“ ‘and vested it with general supervision of all public utilities, including the power, by general or special orders, rules or regulations, or otherwise, to require every public utility to maintain and operate its plant, equipment or other property in such manner as to promote and safeguard the health and safety of its employes, passengers, customers and the public, and to this end to require the performance of any act which the health or safety of its employes, passengers

or customers or the public may demand. By this act the General Assembly, in its discretion, withdrew from cities and villages the power theretofore exercised by them with reference to the speed and operation of railway trains and such power is now vested in the Commerce Commission, another agency of the government.' ”

The Supreme Court further said in its opinion in the case of *Chicago Motor Coach Company v. City of Chicago*, *supra*:

“The contention of the city stated in the notice to the coach company is, that the use of the streets by it is a special and peculiar use different from that made by ordinary vehicles, and therefore unlawful in the absence of a special franchise, license or permission. The whole subject of motor vehicle operation upon streets and highways being under the control of the state, and the legislature having failed to vest in the city authority to license such vehicles or give it power to act when extraordinary conditions intervene, it possesses no such power. It is elementary that an agent possesses no greater authority than its principal. But if the operation of these buses is extraordinary, no legislative utterance has been cited justifying their exclusion by the city from the streets on that ground. It is only contended that because the use is out of the ordinary the coach company must obtain from the city a specific grant of authority to operate its buses, ‘in the form of an ordinance designating the routes and fixing the terms and conditions under which such buses may be operated.’ Having the power and right to operate in the streets, granted directly by the State, there is no occasion to resort to the city for authority. It can grant none.”

Since the rendition of the opinion of Corporation Counsel Busch, the Illinois Commerce Commission on, to wit, September 19, 1928, rendered a decision on the application of the street car company denying it the right to operate buses as feeders or extensions of its system of railways. It is self-evident, therefore, that any ordinance now passed

by the City Council in conflict with the decision of the Illinois Commerce Commission would be without force or power and absolutely void.

Inasmuch as the question has been seriously raised that the passage by the City Council of the ordinance proposed might by implication, estoppel or otherwise extend the term fixed by the Ordinances of February 11, 1907, and March 30, 1908, which grant franchises respectively to Chicago City Railway Company, Chicago Railways Company and Calumet and South Chicago Railway Company, or confer rights to the use and occupancy of the City streets which said companies do not possess at the present time, I believe it would be wise, and therefore I suggest, that in the event the City Council, notwithstanding this opinion, should pass the ordinances in question, that it cause the insertion in them of the following:

“Section All the powers and privileges conferred herein upon said Chicago Railways Company, Chicago City Railway Company and Calumet and South Chicago Railway Company are conferred upon the express condition that no new power or privilege to operate any form of transportation vehicle, street car, motor coach or other devices in the City of Chicago shall be conferred and that particularly this ordinance shall not operate as an extension or a renewal of or as an addition to the ordinances granting a franchise to Chicago City Railway Company to operate a street railway in the City of Chicago passed February 11, 1907, nor to an ordinance granting a franchise to Chicago Railways Company to operate a street railway in the City of Chicago passed February 11, 1907, nor to an ordinance granting a franchise to Calumet and South Chicago Railway Company to operate a street railway in the City of Chicago passed March 30, 1908, nor to any franchise, privilege or grant to any of the said companies which has already by its terms expired. The City of Chicago shall never, by anything herein contained, become estopped nor prevented from asserting the ex-

piration of any franchises, grants or privileges conferred upon any of the said companies which have already expired; and the City of Chicago does not by anything contained in this ordinance recognize any supposed existing, prior or continuing rights of said companies to operate any form of transportation vehicles nor to have their tracks, poles, trolley wires, feed wires and all necessary accoutrements thereto in or upon the streets or alleys of the City of Chicago by virtue of any franchises or contract rights which by their terms have expired, and the privileges herein granted are solely by the sufferance of the City of Chicago and are not in any manner to be construed now or at any time in the future as vested rights; nor shall this ordinance be construed as any recognition of any claimed right on the part of the Chicago Railways Company and/or the other street railway companies herein mentioned to the use or occupancy of the streets of the City of Chicago. Nothing, however, in this section shall be construed as annulling the rights expressly granted by this ordinance to use the streets designated for motor buses under its express terms and conditions.”

(No. 6284—September 26, 1928—L. H.)

TRACTION FUND, INVESTMENT.

The Traction Fund may be invested in tax anticipation warrants, in municipal bonds representing an obligation and pledging the credit of the City, in any interest bearing securities, or in any judgments against the City, the duty of the City with respect to the traction fund being the same as any other trustee having funds in its keeping.

To the Honorable, the City Council of the City of Chicago:

On September 12, 1928, your Honorable Body passed an order directing the Corporation Counsel to prepare

and submit an opinion on the power of the City with respect to the traction fund, such order reading as follows:

“Ordered, that the Corporation Counsel be and he is hereby requested and directed to submit to the City Council an opinion as to the City’s power in the investment of the traction fund and whether said fund may be used for the purpose of buying City bonds and tax anticipation warrants.”

Pursuant to said order, we submit the following:

The City’s power in regard to the investment of the traction fund has received the attention of the Department of Law on numerous occasions, and a number of opinions written thereon appear in the printed Opinions of the Corporation Counsel and Assistants, to several of which we refer.

The gist of these opinions is to the effect that it is not only lawful to invest money from the traction fund in the City’s tax anticipation warrants and municipal bonds representing an obligation and pledging the credit of the City, but, in addition thereto that it can be invested in safe interest bearing securities of other kinds. As far back as October 19, 1914 (see Opinions of 1914-1915, p. 26), which was before the Legislature had granted the City the right to use its surplus funds for the purchase of City bonds, in an opinion approved by Corporation Counsel Beckwith, it was held that the duty of the City with respect to this trust fund was the same as any other trustee having funds in his keeping, and that the City could loan the money on its own bonds. Later on the loan of the City’s surplus funds of any kind on municipal bonds of the City was authorized by the General Assembly.

On May 5, 1913, the City Council adopted an order directing the Corporation Counsel to draft an ordinance authorizing the investment of the traction fund in bonds

of the surface lines and other securities. In an opinion approved by Corporation Counsel Sexton (Opinions of 1913-14, p. 270), it was held that this could be done, but the Council was informed that should the Council direct the City's fiscal officers to invest the money in certain specified securities such officers would thereby be relieved from any and all obligation as to the safekeeping or proper protection of such funds. The Council did not follow this up with any further order.

Again, on June 8, 1918 (Opinions of 1916-19, p. 667), it was held that the traction fund could be used for the purchase of judgments against the City. The following language appears in that opinion, and we adopt it as proper for this opinion:

"The right of the city to invest the fund commonly known as the traction fund has received attention from this department on several occasions. We have uniformly held that this fund stands on a different footing from funds created under statutory provisions, and that it is in the nature of a trust fund which may be invested in securities of such a stable character that they will be readily convertible into cash if the necessity should arise. (See Opinions of Corporation Counsel, 1913-14, p. 270, and Opinions of Corporation Counsel, 1914-15, p. 26.)

"In the case of a statutory fund, the right to use same for any other purpose than that for which it was accumulated is governed by the provisions of the law **which give express authority** to use it. By these provisions such funds may now be used for the purchase of tax anticipation warrants, the city's own municipal bonds, etc. Under the rule that where such specific authority is given by legislative enactment it **must be construed as precluding** the use of such money in any other way, the use of such funds as the water fund, pension funds, sinking funds, etc., is limited to the uses expressly permitted by statute.

"It is different, however, with the traction fund, which was created by and accumulated under ordi-

nances which the City Council itself framed and over the provisions of which it had complete control. The Council could have imposed restrictions on the use of the money while it is held in trust as well as restrictions on the final use that it is put to. But it did not see fit to do so.

“In the absence of any restrictions on the use of the money while it remains in the treasury as a trust fund and is being accumulated for a specific purpose, it may be invested. The rule in such cases is stated in McQuillin on Municipal Corporations, section 2163, as follows:

“‘Seldom have municipal corporations surplus moneys for loan or investment. But where such a condition of affairs presents itself, the municipality has power to loan or invest in proper securities, unless it should be forbidden by statute.’”

Besides those which we have expressly mentioned, there were other opinions given from time to time to the same effect. As recently as October of last year we were called upon to pass on some questions relating to the traction fund, and in an opinion given to the Comptroller under date of October 13, 1927, we made use of the following language:

“With respect to the question whether a loan can be made from the Traction Fund, the Law Department has repeatedly held, both before and since the enactment of the statute permitting the use of surplus funds for purchases of the city's bonds, that the Traction Fund stands on a different footing from funds created by statutory enactment—that it is a trust fund which the City is bound to conserve and which it has the power to lend out for the purpose of securing such return of interest thereon as is reasonably consistent with the safety of the principal. (See Opinions of the Corporation Counsel, 1913-14, p. 270; 1914-15, p. 26; 1916-19, p. 667.) But it should always be borne in mind that if the Traction Fund (or any other similar trust fund in the possession of the City) is to be used for the purpose of making

loans on bonds as security, such transaction is entirely distinct and independent from any authority granted under the statute relating to the use of surplus funds."

All of the opinions from which we have quoted are amply fortified by authorities cited therein but which there is no occasion to repeat here.

The answer to that part of the questions propounded by your Honorable Body which relates to City bonds and tax anticipation warrants, is that such bonds and warrants may be purchased from funds in the traction fund. In fact, such purchases have been made from this fund repeatedly during the last fifteen years, and it would be difficult to find any period during that time when there was not a large amount so invested.

(No. 6285—September 26, 1928—L. H.)

1 FUNDS, SEPARATION OF TRACTION FUND UNNECESSARY.

The various funds of the City are kept in separate accounts, but for the purpose of interest are treated in the aggregate as surplus funds or the general surplus fund; so that in the case of the Traction Fund or any other fund, no separation is necessary, for such accounts are already separated.

2 WORDS AND PHRASES.

"Surplus funds" or the "general surplus fund" is the aggregate of surplus funds made up from the various funds in the City depositary banks.

To the Honorable, the City Council of the City of Chicago:

On September 12, 1928 (Council Journal, p. 3562), your Honorable Body passed the following order:

"Ordered, That the Corporation Counsel be and he is hereby requested and directed to furnish an opinion to the City Council as to the legality of separating the 'traction fund' from the general surplus fund of the City and to prepare and submit to the Council such amendments or ordinances as may be provided for same by law."

In reply to the questions asked in this order, we beg to say that we do not fully understand what is meant by "separating" the traction fund from "the general surplus fund." There is no such thing as a "general surplus fund." There are various funds which have come into the City's treasury in advance of the time when it will be necessary to use the money. They are the funds which are spoken of in the statute as "any fund set aside for use for some particular purpose, that is not immediately necessary for such purpose." By the statute just referred to such moneys may be loaned to the City, the language of the statute being as follows:

“Section 1. That every city, incorporated town or village, now or hereafter holding in its treasury any fund set aside for use for some particular purpose, that is not immediately necessary for such purpose, may by ordinance of the City Council of such city or board of trustees of such town or village use the money in such fund in the purchase of tax anticipation warrants issued by said city, town or village against taxes levied by said city, town or village; such warrants to bear interest not to exceed four per cent per annum, and all interest upon such warrants, and all moneys paid in redemption of said warrants shall at once be credited to and placed in such fund so held by such city, town or village; and the city council of such city, or board of trustees of such town or village, may by ordinance use the money in such fund in the purchase of municipal bonds issued by said city, town or village representing an obligation and pledging the credit of such city, town or village, and all interest upon such bonds and all moneys paid in redemption of said bonds or realized from the sale of said bonds, if afterwards sold, shall at once be credited to and placed in such fund so held by such city, town or village.” Smith’s Stat. 1927, p. 463, par. 666.

It will appear from a careful reading of this law that it was the intention of the Legislature to have the precise fund specified out of which a loan was to be made. This course was followed by the City for a number of years, but it was found after a while that the financing of the City was unduly hampered by adhering to this method of making loans, and it resulted in some funds getting the benefit of the interest allotted while other funds received no interest. It was finally decided to treat the aggregate in the depository banks as if it were made up of surplus from the various funds, and this aggregate of funds has by common usage become known as “surplus funds” or as the “general surplus fund.”

The fact is that the funds remain in separate accounts, and the interest earned by the aggregate is distributed to the various accounts in proportion to the amount in each. If it should be found desirable at any time to make a loan from some particular fund like the "traction fund," or to leave it out from participation of the interest from a loan to the City, all that need be done is to so specify in the ordinance authorizing the loan.

This was done in the case of the traction fund on July 25, 1927 (Council Journal, p. 985), at which time the Comptroller and Treasurer were authorized to purchase from the City \$6,000,000 worth of bonds from the "Sinking Fund for Deposit of Chicago City Railway Company," and \$9,000,000 worth of bonds from the "Sinking Fund for Deposit of Chicago Railways Company." The bonds to be so purchased were specifically set forth. Under this authority the Comptroller and Treasurer could purchase such bonds as they deemed necessary in order to finance the various projects for which they were issued, and the proceeds of same are being paid into the two sinking funds mentioned in the proportion indicated.

It will thus be seen that there is no occasion for a separation because the accounts already are separate, and they can be handled and treated as separate when loans are to be made or bonds are to be purchased. No ordinances or amendments to the Code are required for this purpose, but the Law Department is ready to draft any ordinances that may be needed to carry out the intention of the City Council with respect to such loans or purchases when it sees fit to act on same.

(No. 6286—September 26, 1928—G. F. M.)

1 DISABILITY PENSION, PROOF.

A certificate of disability subscribed and sworn to by the applicant and by a police surgeon or by two practicing physicians of the City of Chicago was necessary to prove disability under the Police Pension Fund Act of 1887; without which proof a pension was improperly granted.

2 DISABILITY PENSION, RESIGNATION, WITHDRAWAL.

A resignation in contemplation of an application for retirement on disability pension may be withdrawn to permit the Pension Board to "retire" an applicant for such pension.

3 PENSIONS, REVOCATION.

A pension which has been improperly granted can be revoked.

4 PENSION BOARD, POWER, REINSTATEMENT OF APPLICANT FOR PENSION.

The law creating a Pension Board is the limit of its authority, and a board created under a subsequent and superseding pension law has no authority to reinstate an applicant for a pension who has failed to comply with the provisions of the previous law.

5 POLICE PENSION FUND ACT OF 1887.

The Police Pension Fund Act of 1887 was superseded by the Police Pension Act of 1915 which Act in turn was superseded by the Policemen's Annuity and Benefit Fund Act of 1921.

6 WORDS AND PHRASES.

"Retired"—One who resigns from service cannot "retire" therefrom within the meaning of section 4 of the Police Pension Fund Act of 1887.

Retirement Board, Policemen's Annuity and Benefit Fund:

Complying with your request for an opinion as to the pension status or pension rights of Joseph LaPlant, the following is submitted:

Our records show that Joseph LaPlant joined the police force in Chicago on June 18, 1883; that he was dismissed from the service on May 7, 1895; that he applied for a disability pension on May 8, 1895; that he was granted a pension on July 1, 1895, in the amount of \$500 per year; that on or about April 9, 1909, further payment of pension to him was discontinued.

At the time Mr. LaPlant was retired from the service there was in force and effect in the City of Chicago, a Police Pension Fund Act known as the Act of 1887. Section 4 of the Act of 1887 was as follows:

“Whenever any person, while serving as a policeman in any such city, village or town shall become physically disabled while in, and in consequence of the performance of his duty as such policeman, said board shall, upon his written request, or without such request if it deem it for the good of said police force, retire such person from active service and order and direct that he be paid from said fund a yearly pension, not exceeding one-half the amount of the salary attached to the rank which he may have held on said police force for one year next preceding such retirement: *Provided*, that whenever such disability shall cease such pension shall cease.”

Section 5 of the Act of 1887 was as follows:

“No person shall be retired as provided in the next preceding section, or receive any benefit from said fund, unless there shall be filed with said board certificates of his disability, which certificates shall be subscribed and sworn to by said person, and by the police surgeon (if there be one) and two practicing physicians of such city, village or town, and such board may require other evidence of disability before ordering such retirement and payment as aforesaid.”

The files of the office in the matter of Joseph LaPlant do not contain any proof of his disability beyond his own written statement and the certificate of one doctor to the

effect that Mr. LaPlant was suffering from a sinus infection due to some previous injury. There is not on file any certificate of his disability subscribed and sworn to by any police surgeon or by two practicing physicians of Chicago as required by section 5 of the Act.

There do not appear to be in existence any records of the meetings of the Pension Board which was administering the Pension Act of 1887 during the years 1895 or 1909 and there is nothing of record in the office to indicate the basis upon which a disability pension was granted to Mr. LaPlant, nor anything to indicate the reason why the payment of pension was discontinued.

The payment of pension was undoubtedly discontinued because there was nothing of record to show that Mr. LaPlant was entitled to the payment of a pension as required by the Act of 1887, viz.:

1. Mr. LaPlant having resigned on May 7, 1895, and his service having terminated, he could not afterward be "retired from active service" under section 4 of the Act of 1887, since he was not in the "active service" on May 8, 1895.

2. If the signing of his resignation was merely done in contemplation of an application for retirement on disability pension, the resignation should have been withdrawn before the Pension Board could "retire" him.

3. The proofs of disability required by the Act were apparently not filed and the Pension Board is entirely without power to grant LaPlant a pension under the law. A Pension Board has only such powers as are given to it by the law creating the Board, and where a pension has been improperly granted, it can be revoked. *Eddy v. Morgan*, 216 Ill. 437.

The Police Pension Fund Act of 1887 was superseded by the Police Pension Fund Act of 1915 and a new Board was created under the Act of 1915 to supersede the Board which formerly administered the fund created by the Act of 1887.

In 1921 the Police Pension Fund Act of 1915 was superseded by the Policemen's Annuity and Benefit Fund Act of 1921, which Act is now operative in the City of Chicago and is being administered by an entirely new Board created by the Act of 1921.

For nineteen years the records in Mr. LaPlant's pension matter have been apparently the same as they were when originally filed. No effort has seemingly been made by Mr. LaPlant to supply the proofs required by the Act of 1887 and without which no pension could legally be paid him. Meanwhile two entirely new and distinct pension acts have been enacted governing police pensions, each administered by a Board of Trustees, or by successive Boards of Trustees, and no provision was ever enacted affecting Mr. LaPlant's claim or the requirements of the Law of 1887 as applicable to his claim. The Legislature has the sole right to prescribe the conditions for being on the pension roll, and these conditions must be complied with by the applicant for a pension. *Stiles v. Board of Trustees*, 281 Ill. 636; *Eddy v. Morgan*, 216 Ill. 437; *People ex rel. Drea v. Hanson*, 330 Ill. 79.

For the reasons hereinabove set out, I am of the opinion that your Honorable Body has no power under the law to reinstate Joseph LaPlant on the pension roll.

(No. 6287—September 27, 1928—F. J. V., F. J. C.)

1 LICENSE, RESCISSION, JURISDICTION.

Fraud and misrepresentation in obtaining a license to operate a dance hall may be made the basis for a suit in equity to rescind the license.

2 BUILDING ENDANGERING LIFE, COMMISSIONER OF BUILDINGS, DUTY.

The owner or agent of a building in a condition which endangers life must be notified in writing by the Commissioner of Buildings to place the building in a safe condition within a reasonable time.

3 LICENSE, REVOCATION.

The arbitrary revocation of a license, such as a license to operate a dance hall is not permissible, as such action may affect property rights.

Hon. Christian P. Paschen, Commissioner of Buildings:

There has been referred to us a letter from you dated September 24, 1928, in which you request advice and expression of an opinion as to what course you may properly pursue to prevent use of any space in the building at 525 South State street as a dance hall. In your letter you cite three violations of the Building Code.

We assume from your letter that the building is of a construction prohibited by the ordinance and that there are insufficient exits and that the floor is not of a sufficient strength as prescribed by the ordinance. The owner of this building obtained a license to operate a dance hall in this building; the license was revoked by the Police Department; the Police Department then closed the dance hall and prevented the use of the building for the purpose of a dance hall. The owner then applied for a writ of mandamus to restore the license and at the same time

preventing the police and the other officials from in any way interfering with the operations of the dance hall.

The court in its judgment order, in this mandamus proceeding, fixed the status by a finding of facts that the owner of the building was operating this dance hall and had obtained his license in conformity with the provisions of ordinances in force, having application to the operation of dance halls.

The order in the mandamus proceeding does not affect the Building Department nor prevent any procedure by that department, looking to the closing of the dance hall for any violations of the Building Code. The question therefore is whether or not your department may proceed without any regard to the existing order in the mandamus case; whether the department may proceed depends on the facts.

Your letter discloses that a license was issued authorizing the operation of this dance hall in this building as it now exists, and that the conditions you now complain of are not new or subsequent conditions. The letter discloses that the department actually knew or is charged with having known the conditions in said building at the time of the granting of this license. The same contentions may be made in any case which might be brought by the Building Department that were made in the mandamus proceeding, and that is that property rights were acquired by virtue of said license and such a status has thereby been created that the Building Department is now estopped from interfering with the operation of said dance hall during the existence of the present license. Any proceeding, therefore, to be successful here would have to be based upon the new conditions, arising since the issuance of the license, which can be reasonably said to be

in violation of the ordinances of the Building Code under which such dance hall may be continually conducted.

Your statement that the license was obtained by misrepresentation would indicate that no new conditions have arisen and that the department is working upon this statement of alleged misrepresentation.

It would seem therefore that the only procedure warranted by the facts and conditions as stated in your letter is a suit to rescind the license as having been obtained by fraud and misrepresentation. To bring such suit in the immediate wake of the mandamus action and in the face of the fact that this dance hall has been conducted under these conditions ever since the issuance of the license, creates a bad atmosphere in a court of equity and might defeat the suit on the ground of a want of equity.

To the suggestion that the Building Commissioner "should determine just where the building is contrary to the requirements, and then serve notice on the owner or occupant requiring him to alter the building so as to conform to the ordinance," we adhere to our opinion that as to the conditions of said building which existed prior to and at the time of the granting and issuing of the license for its use,—condition "that the department actually knew or is charged with having known,"—the suggested procedure cannot be sustained. The leading case on the proposition here involved is that of *Dobbins v. City of Los Angeles*, 195 U. S. 223, 25 Sup. Ct. 18, 49 L. Ed. 169. The same principle applies to the present case as was applied to the decision of the case cited and the operative facts are similar. The case cited was one in error to the Supreme Court of the State of California to review a judgment which affirmed a judgment of the Superior Court in and for the County of Los Angeles in

that State dismissing a bill to enjoin the enforcement of a municipal ordinance.

Plaintiff in error filed a bill of complaint against the City of Los Angeles, seeking an injunction to restrain the enforcement of certain ordinances prohibiting the erection or maintenance of gas works except within the prescribed limits in said city.

The case was decided upon demurrer to the bill. The complaint sets forth, in substance: That on August 26, 1901, the city council of Los Angeles adopted an ordinance making it unlawful to erect and maintain gas works outside of a certain district described in the ordinance, and fixing penalties for the violation thereof; that while this ordinance was in force the plaintiff in error made a contract with the Valley Gas & Fuel Company for the erection of certain gas works upon territory to be thereafter designated by her, and on September 28, 1901, purchased lands within the limits of the privileged districts as fixed by the ordinance; *that on the 22d of November, 1901, upon application to the board of fire commissioners of the City of Los Angeles, that body granted to the plaintiff in error the privilege to erect the gas works upon the territory aforesaid;* (Our italics.) that thereupon the plaintiff in error directed the Valley Gas & Fuel Company to proceed with the erection of the works upon the premises so purchased; that the foundations were constructed at a cost of upwards of \$2,500; that after the foundations had been nearly completed the city council, on November 25, 1901, passed a second ordinance, amending the first ordinance, and thereby so limiting the boundaries of the territory within which the erection of gas works was permitted in said city as to include the premises of the plaintiff in error within the prohibited territory.

The work of construction was continuously carried on until February, 1902, when successive arrests were made for alleged violation of the city ordinance.

The plaintiff in error relying upon the protection of the Fourteenth Amendment to the Constitution of the United States, prayed that the permit granted by the board of fire commissioners be declared to be a valid and subsisting contract between the City of Los Angeles and herself, and that all ordinances passed by the city council in contravention thereof be declared void; that the defendant be enjoined from enforcing said ordinances against the plaintiff, from delaying or interfering with the action of the plaintiff in erecting the said works, from interfering with the maintenance and operation of the same, and for general relief. The Supreme Court says:

“As this case was decided upon demurrer to the complaint, the allegations thereof must be taken as true. The question presented involves the right of the plaintiff in error to invoke the protection of the fourteenth amendment against alleged infraction of her rights by the action of the city council in passing and enforcing the ordinances which prevent the carrying on of the business of making and selling gas to the people of the city. * * *

“In this case we think the allegations of the bill disclose such character of territory, such sudden and unexplained change of its limits after the plaintiff in error had purchased the property and gone forward with the erection of the works, as to bring it within that class of cases wherein the court may restrain the arbitrary and discriminatory exercise of the police power which amounts to a taking of property rights protected by the fourteenth amendment to the Federal Constitution.

“It is also urged by the defendants in error that a court of equity will not enjoin prosecution of a criminal case; but, as we have seen, the plaintiff in error in this case had acquired property rights which, by the enforcement of the ordinances in question,

would be destroyed and rendered worthless. If the allegations of the bill be taken as true, she had the right to proceed with the prosecution of the work without interference by the city authorities in the form of arrest and prosecution of those in her employ.”

The judgment of the Supreme Court, California, was reversed and the case remanded.

In other cases against the enforcement of a void ordinance and the threatened unlawful acts of the administrative officers, it has been held that any party whose interests are to be injuriously affected thereby may and properly ought to go into a court of equity and have the execution of the ordinance and the threatened acts stayed by injunction. *Deems v. Baltimore*, 30 Atl. 6499, 26 L. R. A. 541; *Hoffman v. Schultz*, 31 How. Proc. (N. Y.) 385; *Babcock v. Buffalo*, 56 N. Y. 268; *Audia v. City of Chicago*, 236 Ill. App. 613.

If, as heretofore stated, any action contemplated by the Building Commissioner is to be based upon the contention stated in the letter to the Law Department that the license in this case was obtained by fraud and misrepresentation, then the remedy, as already suggested is a suit to rescind the license. Only one other procedure is legally possible in our opinion, and that too has already been suggested as one “based upon the new conditions arising since the issuance of the license which can be reasonably said to be in violation of the ordinances.”

In our opinion the only advice and direction that can be given to the Building Commissioner is to be found in subdivision (a), paragraph 403 of article 1, chapter XVII of the Chicago Municipal Code of 1922, said paragraph reading as follows:

“403. Buildings found in unsafe condition—notice to owner—authority of commissioner.) (a)

Whenever the commissioner of buildings shall find any building or structure or part thereof in the city in such an unsafe condition as to endanger life, but in such condition that by the immediate application of precautionary measures such danger may be averted, he shall have authority, and it shall be his duty, to forthwith notify, in writing, the owner, agent or person in possession, charge or control of such building or structure or part thereof, to adopt and put into effect such precautionary measures as may be necessary or advisable in order to place such building or structure or part thereof in a safe condition; such notice shall state briefly the nature of the work required to be done and shall specify the time within which the work so required to be done shall be completed by the person, firm or corporation notified, which shall be fixed by said commissioner of buildings, upon taking into consideration the condition of such building or structure or part thereof, and the danger to life or property which may result from its unsafe condition."

Further instructions as to what may be done in this case may be gleaned from a reading of the remainder of this paragraph 403.

It is obvious from a reading of this paragraph of the Building Code that authority to act is given to the Building Commissioner in such cases only where the condition of the building is such "that by the immediate application of precautionary measures such danger may be averted." And any action must be in view of the constitutionally guaranteed property rights of the owner, particularly the right to a hearing and a day in court. As held by the Appellate Court in *Audia v. City of Chicago*, 236 Ill. App. 613, the revocation of one's license and the closing of his business cannot be arbitrarily done.

(No. 6288—September 26, 1928—W. W.)

FOUND AND LOST GOODS, AUTOMOBILES, DISPOSITION.

Unclaimed automobiles found by and in the possession of the Police may be disposed of according to the lost goods provisions of the statutes.

Hon. William F. Russell, Commissioner of Police:

Your letter of the 24th asks an opinion as to what can be done with an old automobile, the owner of which you cannot locate, recently found by the Police Department on the streets of Chicago.

Chapter 50 of Cahill's Statutes, paragraphs 27 and 28 thereof, set out exactly the procedure in this kind of a case, which is as follows:

"If any person or persons shall hereafter find any lost goods, money, bank notes, or other choses in action, of any description whatever, of the value of \$5 and upwards, it shall be the duty of such person or persons to inform the owner thereof, if known, and to make restitution of the same, without any compensation whatever, except the same shall be voluntarily given on the part of the owner; but if the owner be unknown, such person or persons shall, within five days after such finding as aforesaid, take such goods, money, bank notes or other choses in action before some justice of the peace of the proper county, and make affidavit of the description thereof, the time and place when and where the same was found, that no alteration has been made in the appearance thereof since the finding of the same, whereupon the justice shall enter a description of the property thus found and the value thereof as near as he can ascertain, in his estray book together with the affidavit of the finder, to be taken as aforesaid; and shall also, within ten days after the said proceedings shall have been entered on his estray book as aforesaid, transmit to the county clerk a certified copy

thereof, to be by him recorded in his estray book, and to file the same in his office.

“In all cases where such lost goods, money, bank notes or other choses in action shall not exceed the sum of \$15 in value, it shall be the duty of the finder to advertise the same on the door of the court-house, and in three other of the most public places in the county, and if no person shall appear to claim and prove such money, goods, bank notes or other choses in action, within twelve months from the time of such advertisement, the right to such property, where the same shall consist in goods, money or bank notes, shall be vested in the finder; but if the value thereof shall exceed the sum of \$15, it shall be the duty of the county clerk, within twenty days from the time of the reception of the justice's said certificate at his office, to cause an advertisement to be set up on the court-house door, and in three other of the most public places in the county, and also a notice thereof to be published for three weeks successively in some public newspaper printed in this State; and if the said goods, money, bank notes, or other choses in action, be not reclaimed within six months after the advertisement thereof as aforesaid, it shall be the duty of the finder, if the property shall consist in money or bank notes, to deliver the same to the county treasurer, after deducting the necessary expenses, herein-after provided for; if in bonds, bills, notes of hand, patents, deeds of conveyance, articles of apprenticeship, mortgages, or other instruments of value, the same shall be delivered to the county clerk, to be preserved in his office, for the benefit of the owner whenever legal application shall be made therefor; if in goods, wares or merchandise, the same shall be delivered to the sheriff of the county, who shall thereupon proceed to sell the same, at public auction, to the highest bidder, for ready money, having first given ten days' notice of the time and place of sale; and the proceeds of all such sales, after deducting the costs and other expenses, shall be paid into the county treasury.”

If the car is not worth \$5 or more, you need not follow this statute, but can turn it over immediately to the Fire Department, as your letter sets out. However, if for any reason you think its value justifies your following the statute, then you may use your own judgment in so doing.

(No. 6289—September 29, 1928—R. N. L.)

STREETS, WEST 105TH PLACE, WATER MAIN.

West 105th place from Kedzie avenue to South Central Park avenue is a public street by prescription through the action of the authorities of the former Village of Mount Greenwood and its subsequent annexation to the City of Chicago; in which street or place the Water Pipe Extension Division may enter and install a water main in said place.

Hon. Richard W. Wolfe, Commissioner of Public Works:

Your letter of recent date relative to the legal right of the Water Pipe Extension Division to enter West 105th place at Sawyer avenue and install its water main and maintain the same on this property has been referred to me for reply.

An investigation of the condition pertaining to West 105th place between Kedzie avenue and South Central Park avenue shows that part of West 105th place which is in question lies in the territory which was annexed to the City of Chicago from Mount Greenwood and became effective on March 31, 1928; hence the City of Chicago would have all the rights that have been established by Mount Greenwood.

West 105th place was a hiatus resulting from the method of platting the subdivision north and south of said strip of land. It would seem that there was more than 640 acres in this section and the party who subdivided the north 160 acres and the party who subdivided the south 160 acres, left their north and south lines, respectively, on their plats of dedication so as to leave this hiatus which is now known as West 105th place.

We find that this street has been used as a public thoroughfare for over fifteen years and that for a distance of about 135 feet west of South Kedzie avenue, the Village Board of Mount Greenwood (previous to annexation) had improved the street with rubble and cinder surfacing. There is a traveled roadway over the entire distance of the street indicated, and open drain ditches are in evidence on the north as well as on the south side of the street. There is also a cinder walk on the north side of this street from South Kedzie avenue to South Homan avenue; likewise a sign post at the northwest corner of South Trumbull avenue and this thoroughfare, indicating the street intersection as South 105th place and Trumbull avenue. There is also an electric light pole at the northeast corner of South Homan avenue and West 105th place. At the southeast corner of South Homan avenue and West 105th place there is a fire plug. There are also fire plugs at the northeast corner of Spaulding avenue; the northeast corner of Turner avenue; and the northeast corner of Sawyer avenue.

There is no doubt in our mind but that the prescription rights of Mount Greenwood and the City of Chicago, by annexation, has been established, and the laying of the water main in Sawyer avenue which said main would cross West 105th place would be further evidence of acknowledgment on the part of the City of Chicago

that it does consider this as a public street, and we would approve that said water main be laid at your convenience.

Therefore, in our opinion the City of Chicago should consider West 105th place, from Kedzie avenue to South Central Park avenue as appearing on the maps of the Map Department of said City as a public street.

(No. 6290—September 29, 1928—L. H.)

CIVIL SERVICE EMPLOYEE, REINSTATEMENT, BACK PAY.

A municipal employee who has been reinstated under a writ of mandamus is not entitled to back pay where he fails to show that the City had in bad faith paid the salary to a *de facto* incumbent prior to reinstatement.

Hon. John S. Clark, Chairman, Committee on Finance:

We are in receipt of your letter of recent date concerning claim of Mr. Ellis Henry for wages and interest, to which were attached certain papers which we return herewith. This claim is for the sum of \$11,575.95 which it is said is due to Mr. Henry on account of wages withheld and interest thereon.

This matter has received the attention of the Law Department and an opinion was written on the question of the liability of the City on July 3, 1926. This opinion appears in volume XV of Opinions of the Corporation Counsel and Assistants at page 165. The gist of the opinion is that the claim cannot be allowed when based merely on the theory that wages are due because a party was reinstated to a position by mandamus; such claimant must

show in addition to that that the City has not, in good faith, paid the salary to a *de facto* incumbent. We adhere to the same opinion, and therefore refer to it as an answer to your letter, with this addition, that since this letter was written, there have been several decisions of the reviewing courts, strengthening the City in its resistance to claims of this character, where it has, in good faith, paid the salary to a *de facto* officer or employee, the principal case being *Hittell v. City of Chicago*, 327 Ill. 443, 447, which was decided October 22, 1927. In that decision it was held that the presumption is in favor of the City where payment is made and that where there was no judicial decision while someone else was performing the duties of the office the public authorities were obliged to pay the incumbent in order to secure prompt and efficient performance of official duties. The court said, among other things:

“The exigencies of society require efficient performance of official duties, and to secure such performance prompt payment therefor is an essential requisite. Disbursing officers of municipalities are not clothed with judicial power to determine whether or not a person vested with the indicia of an office and performing the duties of such office is, in fact, a *de jure* officer where there has been no judicial determination of such fact. To require the public authorities to withhold the pay of an incumbent or public officer until a judicial decision, or pay the same at the peril of having to pay the same a second time, would be a source of much embarrassment and greatly tend to impair the efficiency of the public service.”

We are therefore of the opinion that on the present state of the record there is no liability on the part of the City, and further, that even should Mr. Henry establish, by a court proceeding, that there was bad faith on the part of the City, he could not recover anywhere near as large a sum as he was demanding, as was explained in the printed opinion herein referred to.

(No. 6291—October 1, 1928—W. W.)

AMUSEMENTS, CLOSING PUBLIC PLACES OF.

The City Council has power to provide by ordinance for the closing of public places of amusement at such time after midnight as it may see fit; but at present, there is no such ordinance, and the Police Department is without power in the matter.

Hon. William F. Russell, Commissioner of Police:

In a recent letter to this department, you call our attention to sections 202 to 210 of the Chicago Municipal Code of 1922 relative to public places of amusement and ask what can be done by the Police Department in the matter of supervising and controlling the time of closing places of public amusement. We take it that by the phrase "the time of closing" you mean the hour at night when public places of amusement will cease to admit, serve, and entertain patrons.

In the absence of any ordinance specifying the time of closing places of amusement the Police Department have no authority or discretion in closing any place of business. The only time in recent years when such an ordinance was in existence was during the late war, when the City Council in 1918 passed an ordinance closing places at 1 a. m. Later on, this ordinance was amended so that certain places, under certain conditions, could remain open until 3 a. m., but this ordinance has been repealed and at present there are no ordinances specifying the time when places of amusement shall be closed.

The Illinois Legislature has given to cities of this State the power to specify the time when places of public amusement shall be closed, as enunciated by our Supreme Court.

Consequently the Council can, if it sees fit, pass such an ordinance.

Therefore, it is our opinion that the Police Department has no discretion in this matter and recommend that if in your judgment such a regulation ought to be made that you take the matter up with the proper committee of the City Council.

(No. 6292—October 1, 1928—L. H.)

1 COAL, REJECTION BECAUSE INFERIOR.

Inferior coal delivered under a contract provision requiring the coal to be from a particular mine must be rejected within the time specified in the contract or within a reasonable time in the absence of a provision fixing a definite time; and such rejection must be made according to the formalities specified in the contract.

2 CONTRACTS, IMPLIED ACCEPTANCE.

An acceptance of coal will be implied under a provision requiring the City to test the coal delivered to it and if found defective to make objection within a specified or reasonable time but no objection is made within such time.

Hon. Richard W. Wolfe, Commissioner of Public Works:

You wrote to this office, under date of August 14, 1928, with reference to the rejection of coal delivered by the Great Lakes Coal & Coke Co., under its contract to deliver coal to various plants of the Bureau of Engineering, one of which was the Municipal Power Plant.

It appears from your letter that this company violated the terms of the contract (which expired July 31, 1928) by shipping coal from other mines than those stipulated

in its bid under which it received the contract. You say that the coal delivered by the company developed most of the required characteristics demanded in the specifications, even to the extent of earning a slight bonus, but nevertheless was unsuitable for the use of the Municipal Power Plant. You further say that, in accordance with the authority given to you under the contract, you rejected 1,981 tons of this unsuitable coal, and that due notice of such rejection and a demand for the removal of same was made on the company in a letter dated August 1, 1928.

The company, in a letter dated August 9, 1928, acknowledged the receipt of your letter of August 1, 1928, but declined to remove the coal, presumably on the theory that the City had slept on its rights and had thereby waived its remedy under the terms of the contract. Certain specific defenses were set up in this letter, which we shall refer to later. It seems that the coal which was rejected as unsuitable is now in a storage pile at the Power Plant, and that it is an accumulation of deliveries made since the beginning of the contract which was about April 20, 1928. You ask whether the City was within its rights in making this demand when it did, or whether the delay in giving notice of rejection has annulled the clause in the specifications which provided for such rejection.

The reply of the Great Lakes Coal & Coke Co. stated, among other things, that, while you demanded the removal of 1,981 tons of screenings, only 1,500 tons were delivered to you; also, that a very substantial amount of the coal furnished to this plant originated at the mine specified in the proposal, and there is considerable doubt whether it is possible to segregate or identify any particular 1,981 tons of coal which you have in storage as originating from a substitute mine. It is claimed that the last coal was delivered prior to May 29th, and that

you made report on June 9th covering all deliveries made on the contract which showed that the coal delivered far exceeded the specifications and gave the contractor a bonus on the basic price. Much is said in this letter about the quality of the coal delivered but in our opinion the question to be determined is whether you acted in apt time.

The provisions in the contract relating to the origin of the coal to be delivered and the right of the City to reject, and the formalities to be observed in rejecting are as follows:

"All coal furnished on contract shall be shipped from those of the mines specified by the bidder in his Proposal (Schedule No. 1) which are accepted by the City direct to point of consumption. No cars re-consigned in transit or purchased on track will be accepted without written order of the Commissioner.
* * *

"The Contractor shall furnish coal of uniform quality, reasonably free from slate, dirt and other foreign matter, and of the kinds and size designated in the proposal sheet.

"Samples will be taken from each car, or from as many cars as may be deemed necessary to represent coal delivered.

"Samples will be taken as soon after the delivery of coal as possible, and will be placed in a closed receptacle. Once each week, or at such other times as may be suitable, according to the quantity of coal delivered, the samples so stored will be crushed, thoroughly mixed and reduced to a laboratory sample by the method of quartering. * * *

"On receipt of a coal sample at the City's laboratory, it will be carefully analyzed and tested by the City Testing Division, the method of analysis to be that adopted by the American Society for Testing Materials.

"The heat value of the delivered coal shall be determined by the City Testing Division by a properly standardized Bomb Calorimeter.

"The thermometers used shall be standardized by the United States Bureau of Standards, and its corrections used.

"The City may make screen tests at its own expense to determine the size of the coal delivered by the contractor.

"The City will mail to the Contractor the result of any coal analysis, heat and screen tests made in accordance herewith.

"If the Contractor does not object to the result of a test or analysis within five (5) days after the time that the result of such test or analysis is mailed to him, then such result will be considered correct and final by both parties hereto. * * *

"All coal shipped from mines other than those approved by the Commissioner shall be subject to rejection by the City.

"If the City accepts coal that is subject to rejection, the price therefor shall be determined as stated under 'Determination of Price.'

"Any rejected coal shall be removed within five (5) days from the premises of the City at the entire expense of the Contractor after written notice has been mailed to the Contractor by the City that such coal is rejected. * * *

"If the analyses and tests of the last samples taken during any month are not completed in time to determine the average for that month, they shall be included and used in making up the average analyses and tests for the next succeeding month.

"Any coal delivered too late in the month to be sampled and analyzed during that month shall be included with the coal delivered during the next month, and shall be paid for at the price determined from analyses and tests made during such month."

There are many other provisions contained in the contract which bear on the question at issue, but we believe we have quoted enough to indicate what are the respective rights of the parties to this controversy.

In our opinion the question of the time when complaint is to be made and when the coal may be rejected is an important element to be considered in determining whether the City is within its rights. The contract does not say how soon the City must take advantage of its right to reject the coal under the particular clause involved, but there are many things in the contract which indicate that action must be taken with at least reasonable promptness.

Thus, it seems that it was contemplated that there should be weekly tests of the coal delivered, and elaborate provision is made for the manner of conducting the tests. After the tests are made the City was to mail the result of the coal analysis and heat and screen tests. If the contractor does not object to the results thus reported within five days "then such result will be considered correct and final by both parties hereto." Even this last clause does not say that the City will be estopped from rejecting the coal on account of being from a substitute mine, but the general tenor and effect of this language will undoubtedly be construed as meaning that if the City does not make objection or complaint at the time it announces the result of the test or at least by the time the contractor's five days for objection have expired it will be understood as having accepted the coal.

This view is further borne out by the fact that, in providing for payment, the contract clearly contemplates that the end of the 5 day period closes the discussion, so far as acceptance or rejection of either the results of the analysis or of the coal is concerned, and monthly payments are to be made in accordance with the results of the tests. Finally, the time of payment being fixed as occurring from month to month, with the possibility of a period running over into the next month (but no farther) seems to leave

no excuse for failure to reject the coal, if it is to be rejected, before the date of payment.

We are therefore of the opinion that the City cannot at this late day avail itself of the clause of the contract which gives it the right to reject coal from a substitute mine regardless of whether it meets substantially the requirements set forth in the specifications.

(No. 6293—October 3, 1928—L. H.)

CIVIL SERVICE EMPLOYEES, LAYING OFF.

The laying off for thirty days or less of Civil Service employees if done in good faith and from motives of economy in response to an order of the City Council or the Mayor or the Comptroller as head of the Department of Finance cannot be made the basis of a claim for salary for the period of the lay-off; but if the lay-off is for a period greater than thirty days, the strict rules as to status and seniority must be followed provided this does not unduly hinder or injure the service.

Hon. George K. Schmidt, City Comptroller:

You have made inquiry concerning the rights of the City in the matter of laying off employees in order to comply with the Mayor's retrenchment order.

You state that in the various departments they are adopting plans for layoffs which vary slightly, but which contemplate the reduction of expenses by saving on the payrolls. You also call attention to the fact that in practically all the departments there are both civil service employes and temporary employees in different classes of service. The question, therefore, arises whether the layoffs

will have to follow some strict rule of the statute or of the Civil Service Commission with respect to seniority. It is intimated that, unless some rule is followed that will stand the test, civil service employees thus laid off will claim that there has been some invasion of their rights and demand pay for the period in which they were out of service.

In case the layoffs are for periods of longer than thirty days there may be serious question of the right of the head of the department to lay off civil service employees otherwise than in the inverse order of their appointment. If the period of layoff does not exceed thirty days, however, it is merely a question of good faith. The head of the department cannot arbitrarily lay off for thirty days or less without a good reason for doing so. But if this is done from motives of economy, in response to an order of the City Council or the Mayor, or the Comptroller as the head of the Department of Finance, the right to do so cannot be questioned and no claim for salary for the period of the layoff can be sustained.

Section 12 of the Civil Service Act (Cahill's Stat., 1927, p. 435) fixes the rights of civil service employees with respect to removals. It prohibits their removal except as a result of written charges and a hearing thereon. Then follows this provision:

“Nothing in this Act shall limit the power of any officer to suspend a subordinate for a reasonable period, not exceeding thirty days.”

This provision was construed by our Supreme Court in the case of *Thomas v. City of Chicago*, 273 Ill. 479. In that case certain civil service employees who had been laid off for periods not exceeding thirty days in pursuance of an order for retrenchment brought suit to recover their salaries during the time they were thus out of the service.

The court held that they could not recover, saying, among other things:

“The language of section 12 is explicit and unambiguous. It provides squarely that ‘nothing in this act shall limit the power of any officer to suspend a subordinate for a reasonable period, not exceeding thirty days.’ It is contended by counsel for the appellant that this provision only refers to suspensions for cause, as enumerated in that section, and was clearly inserted for the purpose of enabling the head of a department to maintain necessary discipline and efficient service by temporarily suspending an employee pending an investigation of charges preferred against him or while his case was being considered. While, undoubtedly, the head of the department would necessarily have the power to suspend a subordinate for these causes if the head of a department were to have any control over such subordinate or anything to say about the management of his department, there are a great many causes, other than those given by counsel for appellant, which might make a suspension or lay-off of the employees of a department necessary. Can it reasonably be said, under the clear and explicit language of the statute, that the head of the department has not the power to lay off employees under him for periods of less than thirty days for lack of work, lack of funds or other good cause? The Appellate Court has made a finding of fact that the action of the head of the department was taken in good faith and in the interest of economy and necessary retrenchment and with no intent to circumvent or evade any provision of the Civil Service Law, and this finding of fact is conclusive on this court. A different question would be presented if it appeared that the plaintiff had been suspended or laid off for the purpose of evading the provisions of the Civil Service Law. In *Fitzsimmons v. O’Neill*, 214 Ill. 494, we held that section 12 of the Civil Service Act, providing that no employee in the classified service shall be removed except for cause, upon written charges, etc., does not apply to removal from office consequent upon the abolishment of the office if it is in good faith and in the interest of economy, and we think the same principle should be

applied in the case at bar. We are obliged to assume from the finding of facts that the head of the department of health was obliged, in the interest of economy and because of lack of funds, to reduce the force of sanitary inspectors under him, and did so in such a manner as in his judgment the best interests of the city required. If he had arbitrarily followed the rule of the civil service commission it may have been that certain parts of the city or some districts would have been left without inspectors, or their places would have been filled by men taken from other districts who were not as familiar with such districts or certain lines of business, and the work of the department would have been impaired."

Thus, it will be seen that, in such a situation as now exists, if the head of the department proceeds in a manner that does not indicate an unjust discrimination, and in good faith lays off employees for periods not exceeding thirty days from motives of economy, his action will undoubtedly be sustained by the courts.

If it is the contention to make layoffs for periods of more than thirty days, it will be advisable to adopt so far as possible and to follow strict rules as to status and seniority. The temporary employees then, unless some contrary reason exists, would have to be laid off first, and then the civil service employees in reverse order of their seniority. The Civil Service Commission has established a rule which can be adopted for this purpose.

Even where the rule of seniority is invoked, it cannot be applied with such strictness that it will unduly hinder or injure the service. If there is need of varying it the head of the department may vary it for the good of the service. But if he does so he must be prepared to show that there was a good reason for doing it—that some feature of the work would have suffered if he had not done it, or that there would have been a suspension of the

proper functioning of the department by reason of a too strict adherence to the rule of seniority.

If the suggestions we make in this letter are carried out in good faith by the heads of the departments no obligation will exist on the part of the City to pay salaries for employees when not employed.

(No. 6294—October 3, 1928—L. H.)

1 COMPTROLLER, TRACTION FUND, DUTY.

It is the duty of the Comptroller to observe an order of the City Council directing the investment of any part or all of the Traction Fund in any kind of securities, unless the securities appear to be unsound; in which case, the Comptroller must bring the matter to the attention of the City Council.

2 FUNDS, INVESTMENT, RESPONSIBILITY.

An order of the City Council which directs fiscal officers to make investment in a certain way relieves such officers from all obligation as to the safety or proper protection of the funds, if such order is carried out in strict accordance with its terms.

Hon. George K. Schmidt, City Comptroller:

In your letter of this date you asked us to advise you as to the authority of the City Council to direct the investment of moneys in the traction fund and to specify what character of investments should be purchased with such money. You further ask if an order is passed by the City Council directing the Comptroller to invest such fund in a certain way, whether the Comptroller is bound to observe the order, and whether his responsi-

bility for the security of the fund ceases by reason of such direction of the City Council.

With respect to the power of the City Council in relation to the traction fund, we direct your attention to an opinion we have just rendered to the City Council, and which was presented at its last meeting. It appears in the printed Journal of the Council of September 26, 1928, at page 3584. We believe it answers all questions you have in your mind concerning the authority of the City Council in the premises.

If the City Council orders that any fixed sum belonging to the traction fund should be invested in any particular kind of securities it will be your duty to observe the order, since power and authority is vested in the City Council to control the finances and property of the corporation. The only reason for not observing the order would be in case there should appear to be a danger to the fund which you are aware of, but which has not been taken into account by the City Council—that is to say, it is your duty to advise the City Council in case it is about to make a mistake in the matter of the disposition of this fund. If it directs you to invest the fund in securities which you consider unsafe or which, for any other reason, would hamper the City's finances, or the handling of the particular fund, it will be your duty to bring this to the attention of the City Council. In every other respect the City Council's order must be observed.

With respect to the responsibility for the security of the fund, the Law Department has repeatedly advised the City Council that if it directs the City's fiscal officers to invest the money in certain specified securities, such officers would thereby be relieved from any and all obligation as to the safety or proper protection of such funds if they carried out the orders of the City Council in strict

accordance with its terms. We again made mention of this fact when we advised the City Council in the opinion above referred to.

(No. 6295—October 3, 1928—W. W.)

LICENSE, RECEIPT FOR FEES CONFERS NO RIGHT TO OPERATE.

A receipt for money paid to the City Collector upon an application for license gives the applicant no right to operate the business or occupation required to be under license; and the Police Department may proceed against the applicant for license as if no money had been paid.

Hon. William F. Russell, Commissioner of Police:

In a letter of recent date you ask our opinion concerning the status of public places of amusement that are operating without a license from the City but have a receipt from the City Collector showing payment of the fee for the license, upon an application which a department has not approved.

Payment of the license fee and receipt therefor creates no right to operate and confers no privilege. The ordinances clearly set out the status of an applicant for a license in a situation of this kind as follows:

“Section 2414A. All applications for a license made to the City Collector, shall, after approval by the Commissioner of Buildings as to compliance with the zoning ordinance, be accompanied by the full amount of the fee payable for such license.

“Whenever a license cannot be issued at the time the application for the same is made, the City Col-

lector shall issue a receipt to the applicant for the money paid in advance. All such receipts shall have plainly indicated thereon that the receipt or payment of the license fee is not to be construed as the issuance of a license.

"No such receipt, or the payment of any license fee in advance of the issuance of the license in due form, shall entitle or authorize any person, firm or corporation to any of the rights or privileges conferred by the issuance of any license, or to the opening or maintaining of any business or establishment contrary to the provisions of any of the ordinances of the City of Chicago.

"Section 2414B. Whenever a license is not approved and the applicant has not engaged in the business or industry for which the license was sought, the license fee paid in advance shall be refunded to the applicant upon the recommendation of the City Collector and the approval of the City Comptroller.

"Whenever the applicant engages and continues in any business or industry throughout the greater part of the period for which a license has been applied for, and whenever such license has not been approved by the department or departments having jurisdiction and no proceeding or action is pending to close or discontinue such business or industry, the City Collector shall recommend the issuance of the license on the last day of the respective license period, and the Mayor may issue such license as a Provisional License pending the approval or action of the departments having jurisdiction. In such instances the provisions of this section shall be construed to be effective in lieu of other ordinances in conflict therewith." 1923-24 Council Journal, page 769.

The Police Department may proceed against these places in the same manner as if they had not paid any fee and had no receipt.

The approval of the application for a license by the Department of Health, the Police Department and the Building Department is a condition precedent to the issu-

ance of a license for a public place of amusement. The City Collector's receipt for the fee paid certainly is no evidence of compliance with this condition.

The question of refunding a part or the whole of amounts paid by these applicants is not before us.

(No. 6296—October 4, 1928—L. H.)

1 FRONTAGE CONSENT BY CITY, CITY COUNCIL'S ACTION NECESSARY, PRESUMPTION.

The consent of the City to frontage rights can be given only in pursuance of an order or direction of the City Council; which may be, either by special or general ordinance. Consent by Comptroller and approved by the Real Estate Agent will be presumed to have been given regularly unless the contrary is made to appear.

2 BUREAU OF MAPS, SIGNATURES.

The Bureau of Maps may assume that the signatures of public officers are genuine unless its attention is called to some irregularity and there appears to be good ground for withholding action until the irregularity is overcome. The Bureau may on its own motion question the genuineness of signatures on behalf of the City itself if a document on its face shows irregularity.

Hon. Richard W. Wolfe, Commissioner of Public Works:

We are in receipt of a letter from the Superintendent of Maps in which he makes inquiry as to the authority to sign frontage consent petitions on behalf of the City and the manner of signing.

It seems that it has been the practice, when the City gave its consent on a frontage consent petition, for the

Comptroller to sign on behalf of the City without indicating any special authority under which he signed.

The letter of the Superintendent of Maps begins with the inquiry whether a signature to such a petition "executed in the following form should be allowed." The form is then given, showing the signature of the Comptroller and the approval of the real estate agent, which, it is said, has been the form used for over six years.

The letter then goes on to say that the contention has been made that these officers have no authority to sign such a petition on behalf of the City without an order of the City Council giving them the power to do so. That is the real question that is raised—not the form of the signature.

With respect to frontage consents by municipal corporations, we have always held that such municipal corporations as park boards and the Board of Education have the same right to give assent as other abutting property owners, but in such cases the corporate authorities must take appropriate action. (See *Opinions of Corporation Counsel and Assistants from 1872 to 1897*, page 119; *Opinions from May 1, 1915, to June 30, 1916*, page 60; *Opinions from July 1, 1916, to December 31, 1919*, page 255.) The same rule that applies to these municipal corporations applies to the City of Chicago. The City has the right to give its consent, but it can do so only as the result of action of the proper corporate authorities. In other words, the consent may only be given in pursuance of the order or direction of the City Council. This order or direction may be given in each individual case, or it may be given by general ordinance covering conditions and situations therein named.

The Superintendent of Maps further asks whether it is incumbent on him to investigate the authority of officials

of the City when they sign on behalf of the City of Chicago on such petitions. In reply to this, we again state what we have often advised, that the Bureau of Maps is not called upon to examine into the genuineness of signatures or the authority of signers in such cases. It has the right to assume the correctness and validity of a signature unless its attention is called to some irregularity which brings into question either the authority to sign or the genuineness of the signature. Where such notice is given and there appears to be some ground for it, the Bureau would undoubtedly be justified in holding up a petition until the irregularity is overcome. The rule applies to the City of Chicago as well as to all other signers, with this exception, that the Bureau may on its own initiative inquire into the matter, if the face of the petition indicates that some City officer has overstepped his authority.

(No. 6297—October 4, 1928—L. H.)

1 FUNDS, TRANSFER.

The transfer within a department from one object or purpose to another of funds appropriated to the department is permissible under section 2-a, article 7 of the Cities and Villages Act.

2 CITIES AND VILLAGES ACT.

Section 2-a, article 7 of the Cities and Villages Act (Cahill's Stat., 1927, p. 319) is liberally construed.

Hon. John S. Clark, Chairman, Committee on Finance:

You have submitted to this department a request of the Commissioner of Public Works to transfer the sum

of \$12,000 from Account 81-DX-51 to Account 70-S-3, and you ask to be advised whether this transfer can be legally made, and whether any complications are likely to develop in case the transfer is made.

Both of the accounts referred to are within the Department of Public Works. In Account 81-DX-51 the City Council made a large appropriation for the purchase of machinery and equipment for use in connection with the cleaning of streets and alleys and snow removal. It now is asked to transfer a part of this appropriation to the account set up for the services of engineers, accountants, etc., for purposes of Calumet Harbor, Water Terminals and City Hall building. We see no reason why this should not be done if the City Council deems it proper to do so. The section of the statute under which transfer of appropriations are authorized reads as follows:

“The city council of cities, and board (s) of trustees in villages having a population of one hundred thousand or more, shall, at any time after the first half of each fiscal year, have power, by a two-thirds vote of all the members of such body, to make transfers within the department or other separate agency of the municipal government, of sums of money appropriated for one corporate object or purpose to another corporate object or purpose.” Cahill’s Stat., 1927, p. 319, par. 93.

The Law Department has been called on a number of times to construe the power thus granted to the City Council. We have consistently held that the provision is to be liberally construed to the end that the City may have the full benefit of same, and not be hampered when it finds it necessary to make a transfer. Therefore, we have held that as long as the transfer is made within the department it comes within the meaning and intent of the law. In this case both appropriations are from the

general corporate fund, and both are within the Department of Public Works. Hence, it is authorized by the statute.

We call your attention to an opinion written under date of October 10, 1917, and appearing in the Volume of Opinions of 1916-1919, at page 425, wherein the following is stated:

“We have heretofore construed this section so that transfers may be legally made from one bureau to another in a department of the city government where the department head controls both bureaus. Such an interpretation is warranted by the language of the statute. We see no reason why the executive officers of the city should themselves undertake to limit such transfers to any greater extent than is necessary under a strict construction of the language used.”

See also opinion dated July 24, 1923, in printed volume of Opinions for 1923-1924 at page 322.

(No. 6298—October 4, 1928—R. N. L.)

FENCES, BARBED WIRE.

Barbed wire fences 6 feet from sidewalk are within the prohibition of ordinance.

Mr. Herbert Bebb, Chicago, Illinois:

Your letter of recent date, addressed to the Corporation Counsel, relative to the construction of a barb wire fence about six feet in from the sidewalk along your property at 1652 West 102d street, has been referred to me for reply.

Section 2696 of the Municipal Code of 1922 relative to barb wire fences reads:

“No person shall build, construct, use or maintain any fence or barrier consisting or made of what is called ‘barbed wire,’ or of which barbed wire is a part, within the city, along the line of or in or upon or along any street, alley or public walk or drive: or through, along or around any public park; or in and about or along any land or lots or parks owned or controlled by the city.”

This section of the Code prohibits the building, construction, use or maintenance of any fence or barrier consisting or made of what is called “barbed wire,” or of which barb wire is a part, within the City, along the line of or in or upon or along any street, alley or public walk or drive. The fact that you propose to construct such a barb wire fence within six feet of the lot line would be a violation of section 2696, as said section prohibits the use of barb wire within the City.

Therefore, in our opinion, the construction of the fence as you contemplate will be in violation of said section 2696.

(No. 6299—October 5, 1928—L. H.)

STREETS, TRAFFIC RESTRICTIONS, CITY COUNCIL, POWER.

The City Council has power to restrict by general ordinance traffic on streets coming within definite classification, as in case of hospitals or residential neighborhoods and thereby keep off heavy traffic or prohibit it within certain hours; but a more practical way is to transfer jurisdiction over such streets to park districts which have the power to make such streets boulevards or pleasure driveways.

Hon. A. K. Mose, Alderman, 50th Ward:

Some time ago you asked to be advised as to the legality of a proposed ordinance restricting against heavy traffic on Fargo avenue from Western avenue to Kedzie avenue and Rockwell street from Touhy avenue to Pratt avenue.

The subject of so restricting certain streets has several times had the attention of the Law Department. The gist of the opinions rendered on this subject is to the effect that it is possible to set aside streets for use as pleasure driveways, the practice ordinarily being to transfer jurisdiction to the park district and thus making the street a boulevard, and also that it would be legal, by an ordinance applying generally to streets of a certain class, to restrict traffic on streets coming within such definite classification so that heavy traffic can be kept off or at least prohibited within certain hours. See Opinions of the Corporation Counsel and Assistants, 1914-1915, p. 168; 1924-1925, p. 519; Vol. XV, p. 391.

We can add nothing to what has been said in the opinions we refer to. The streets you mention could be closed to heavy traffic by turning them over to the park district as pleasure driveways. The City's powers in this respect are more limited than those of the park districts.

It was held in *Cicero Lumber Co. v. Town of Cicero*, 176 Ill. 9, that a city or village can designate only two streets within its limits as pleasure driveways. Hence, it is clear that turning the streets over to the park district is the most practicable way of dealing with the matter.

The particular objectionable feature aimed at can sometimes be reached by a general ordinance restricting such heavy traffic in the neighborhood of hospitals, or restricting it in residential neighborhoods to certain hours. It may be that the object you have in mind can be secured through a general ordinance, and if that is the case the City's powers are sufficient to accomplish it.

(No. 6300—October 5, 1928—L. H.)

APPROPRIATIONS, DEPENDENT AND DELINQUENT PERSONS.

The City Council is without power to appropriate money for the care and maintenance of dependents and delinquents, the State and County alone having that power.

Mrs. Wilfred S. Reynolds, Director, Chicago Council of Social Agencies:

We are in receipt of your letter of recent date in which you ask information concerning the City's appropriations for the care and maintenance of dependent, neglected and delinquent members of the community.

The care of dependents and delinquents is not a City function. It is within the jurisdiction of the State. Therefore the State itself, and in some instances the County

acting as an arm of the State has the responsibility and control of all such matters. The only exceptions are cases of emergency, and in the case of delinquents those who violate City ordinances and are fined and imprisoned for such offenses. Thus, in the case of hospitals, the City operates some emergency hospitals, also such hospitals as have house patients who would otherwise be a menace to the public health. This is the reason for the Contagious Disease Hospital, the Iroquois Memorial Hospital, the Venereal Disease Hospital, etc., being operated by the City instead of by the County.

You are probably mistaken when you say the City makes an appropriation to the St. Vincent's Asylum. There is no appropriation in the nature of subsidy of any kind to any such institution. Three appropriations appear in the Annual Appropriation Bill (Council Journal, January 16, 1928, p. 1777), under the head of "Hospitals," where sums are appropriated "for supplies and maintenance, not including salaries, in the reception and care of abandoned and destitute children," etc. Three different institutions are named, but money can only be paid to them on bills presented by them for supplies and maintenance in accordance with the ordinance. St. Vincent's Asylum is not among these. There would probably be difficulties encountered if it were included, because it is a sectarian institution, and it is likely that the constitutional provision prohibiting religious preference would be invoked against it.

(No. 6301—October 6, 1928—L. H.)

1 INSPECTION, COOLING PLANT.

Cooling plants in drug stores are subject to inspection under present ordinance.

2 MUNICIPAL CODE OF 1922.

Section 3679 of the Municipal Code of 1922 does not apply to residences unless there is a cooling plant of higher pressure than is ordinarily used in residences; but said section does apply to cooling plants used in drug stores.

*Hon. George E. Nye, Chief Inspector of Steam Boilers,
Steam and Cooling Plants:*

We are in receipt of your letter concerning the inspection of cooling plants in the drug stores of the Walgreen Co., to which was attached a letter from Mr. Edwin A. Munger, questioning the right of the City to make these inspections.

It is stated in Mr. Munger's letter that he is of the opinion that the intention of the ordinance is to provide for inspection of ice making plants and coolers in places where the making of ice or cooling air is the principal business, and not where a small plant is used in connection with some other business as in the case of Walgreen Co. He says that the Frigidaire and Nizer machines used by Walgreen Co. are the same as those used in residences except that where it is necessary two are used in place of one. He assumes, therefore, that because there are no inspections made of such apparatus in private residences the Walgreen Company should not be required to pay the inspection fee.

The section of the ordinance to be construed is the following:

“It shall be the duty of the chief inspector of steam boilers and steam plants, and his assistants, in addition to the duties specified in article 1 of this chapter, to inspect all manufacturing houses, ice-making houses, cooling plants, refrigerators, packing houses, cold storage houses, chill rooms, freezers, or any other factory or place wherein the piping, machinery and apparatus is under pressure, including boilers, tanks, jacketed kettles, generators, reservoirs and pipes used therein, and the apparatus connected therewith, and extensions thereunto, wherein ammonia or other poisonous liquids, acids, gases, vapors, or a combination thereof, poisonous or otherwise, are used in manufacturing houses, ice-making houses, packing houses, cold storage houses, chill rooms, freezers, cooling plants, refrigerators, or any other factory or place whatsoever owned or operated by any person, firm or corporation within the City of Chicago. Said inspection shall be made at least once a year and oftener whenever, in the judgment of said chief inspector, such inspection shall be necessary.” Sec. 3679, Municipal Code of 1922.

It will be noted that the ordinance makes no specific exception of cooling plants in private residences, but it provides for inspection in places of business and says nothing about similar inspections in residences. We gather from the general tenor of the section quoted above that, unless there is a plant of higher pressure than ordinarily used in residences, no inspection in residences is contemplated. There is authority, however, for making inspections in all places of business, and not merely those where the making of ice or cooling of air is the principal business. The fact that the machines in the stores are the same size or nearly the same size as those used in private residences is not the only thing to be taken into account in determining whether they are to be inspected. There may be other elements of danger that warrant making the distinction.

It is quite clear that the ordinance does not confine inspections to those places where ice making or refrigeration is the principal business. We would not hold that your practice is discriminatory on the facts before us.

(No. 6302—October 8, 1928—G. F. M.)

1 POLICE PENSION, PRESENT EMPLOYEE UNDER 50 YEARS OF AGE.

A present employee under 50 years of age is entitled to an annuity from and after the time he reaches 50 if he takes annuity under section 55; he is entitled to annuity after he reaches 50, only from date of application for same if he takes annuity under section 31 of the Policemen's Annuity and Benefit Fund Act.

2 POLICEMEN'S ANNUITY AND BENEFIT FUND ACT.

Section 31 of the Policemen's Annuity and Benefit Fund Act fixes payment of annuity from date of application for same and gives applicant no right to payment for any period elapsing between the date when the applicant reaches 50 years of age and the date of the application.

3 POLICEMEN'S ANNUITY AND BENEFIT FUND ACT.

Section 55 of the Policemen's Annuity and Benefit Fund Act fixes the payment of annuity from the date when the applicant reaches the age of 50 years, regardless of his age at the time he makes application for same.

Retirement Board, Policemen's Annuity and Benefit Fund:

Replying to your request for an opinion as to the date from which annuity or pension shall be paid to a present employee who resigns or is discharged from the Police Department before he has attained the age of fifty years, the following is submitted:

Paragraph (e) of section 31 of the Policemen's Annuity and Benefit Fund Act provides for the payment of an annuity after he attains age 50 to any present employee who has served ten or more years and who at the time of his resignation or discharge shall be less than fifty years of age and who shall apply for such annuity. Paragraph 4 of section (e) reads as follows:

“Any such annuity shall be computed as though such present employee were exactly fifty (50) years of age at the time such annuity shall be granted, regardless of his real age at the time application for such annuity shall be made, and no such present employee shall have any right to any annuity for or on account of any time which may intervene between the time when he shall attain an age of fifty (50) years and the time when he shall make application for such annuity.”

Section 55 of the Policemen's Annuity and Benefit Fund Act provides for the payment of annuity after twenty years of service to any present employee, where the annuity provided in any preceding section is less than the amounts provided for in section 55. The last paragraph of section 55 reads as follows:

“Any such present employee who shall be less than fifty (50) years of age at the time he shall resign or be discharged from the service shall have a right to receive annuity, from and after the date upon which he shall become fifty (50) years of age, of an amount equal to fifty (50) per cent of the salary of such present employee as such salary shall be at the time of his resignation or discharge from the service but not in excess of the sum of nine hundred dollars (\$900.00) a year.”

It appears from the reading of the above quoted provisions of the Act that if a present employee is paid an annuity under section 31, then the payment of such annuity begins only at the time he applies for the same and

that he has no right to the payment of any annuity for any period of time that has elapsed between the time when he reached fifty years of age and the time when he applied for his annuity, while section 55 provides that if he takes his annuity under section 55 instead of section 31, then he becomes entitled to payment from the date when he reaches the age of fifty years, without regard to his age at the time he files his application. In other words, if a present employee who resigned or was discharged from the Department before attaining the age of fifty years, should be fifty-two years of age at the time he applied for his annuity, he would not be entitled to any annuity payments for the two years that elapsed before he applied, if he takes under section 31 of the Act; whereas, under section 55 of the Act, if he is fifty-two years of age at the time he applies, he is entitled to all of the back payments of pension for the preceding two years that elapsed after he attained the age of fifty years.

I am of the opinion that any present employee who resigns or is discharged while under fifty years of age, is entitled to annuity from and after the time he reaches fifty years of age if he takes annuity under section 55 without regard to when he applies for the same and that, if he takes annuity under section 31, he is entitled to such annuity only from the date when he actually applies for the same.

(No. 6303—October 9, 1928—L. H.)

1 CONDEMNATION PROCEEDINGS, JUDGMENT.

A judgment in a local improvement or condemnation proceeding must be paid from the proceeds of the special assessment where the ordinance declares that the improvement shall be paid by special assessment against the property benefited; the judgment against the City is general for that part of the cost of an improvement which is to be borne directly by the City. The City is liable for all preliminary costs and expenses where the improvement has been abandoned.

2 MANDAMUS, COLLECTION OF SPECIAL ASSESSMENT.

A creditor under a condemnation judgment may compel the City to proceed with the collection of a special assessment where the ordinance declares that the improvement shall be paid by a special assessment against the property benefited.

3 DAMAGES, CONDEMNATION PROCEEDINGS.

The owner of property against which condemnation proceedings are pending but which are not diligently prosecuted may recover damages for such loss as he can prove in the way of lost rents, etc.

Hon. John S. Clark, Chairman, Committee on Finance:

In response to your oral request for an opinion as to the legal effect of judgments in condemnation cases in local improvement proceedings, we submit the following:

The precise question you asked was whether such a judgment constituted a judgment against the City for which the judgment creditor could compel a tax levy or whether such judgment could only be paid for from proceeds of a special assessment.

Under the law that was in force in 1893, before the present Local Improvement Act was passed, it was held that such a judgment was not a general obligation of the

City, and that the judgment creditor could not go beyond the method of payment provided for by the ordinance authorizing the making of the improvement. (*City of Chicago v. Thomasson*, 259 Ill. 322.) Since it was lawful to make any kind of public improvement payable out of the general fund, it was necessary even at that time to look to the ordinance in order to determine whether the provision for payment was limited to a special assessment. If the improvement was to be made under the Local Improvement Act then in effect the judgment in condemnation was not a lien against the general corporate fund. This ruling of our Supreme Court seems to be modified in later decisions which construe the present Act.

Inasmuch as the decision relating to the earlier Act was rendered as late as 1913, we deem it proper to outline its scope, in order that there may be no confusion as to what the law is now.

In the *Thomasson case* the owner of the property that was condemned voluntarily turned it over to the City before being paid for it. This created a situation not contemplated by the statute, which provided for payment before the land was taken. The owner sought to recover a general judgment against the City, but it was held that he could not do this. The court said, among other things:

“A condemnation proceeding such as this is not founded on the common law but must have a statutory origin. The only statute in existence upon which this proceeding could be founded at the time the original ordinance was passed and the condemnation proceeding begun was said article 9 of the Cities and Villages Act of 1872, which act is expressly referred to in the ordinance as the statute upon which it was based. This act has been superseded by the Local Improvement Act of 1897, which provides that pending proceedings shall be completed under the provisions of the act of 1872. While it is true that the city was empowered at that time to condemn land

for various corporate purposes and pay for the same out of its general funds without any reference to said article 9 of the Cities and Villages Act, it was only under the provisions of this article that the city might condemn property for a local improvement. The only power the city had in the premises, and the only power and authority possessed by the court in the proceedings instituted pursuant to the ordinance, was that derived from said article 9. That article provided for a purely statutory proceeding and was a complete code in itself. By section 1 it provided 'that the corporate authorities of cities and villages are hereby vested with power to make local improvements by special assessment, or by special taxation, or both, of contiguous property, or general taxation, or otherwise, as they shall by ordinance prescribe'; and by section 2, 'when any such city or village shall, by ordinance, provide for the making of any local improvement, it shall, by the same ordinance, prescribe whether the same shall be made by special assessment or by special taxation of contiguous property, or general taxation, or both.' We have held that under this statute, payment may be made in any one of the modes provided. It may be made out of the general funds, by special taxation, or by special assessment, but the adoption of any one or more of these modes by a local improvement ordinance excludes the idea of payment in any other manner. *People v. Village of Hyde Park*, 117 Ill. 462; *Village of Morgan Park v. Wiswall*, 155 *id.* 262." *City of Chicago v. Thomasson*, 259 Ill. 322.

While this decision settled the general proposition and fixed the status as to what the condemnation judgment could be collected from, the court held that the City had not been diligent in collecting the assessment. Later on the same case came up in another form, the assignee of the owner seeking to recover damages. The court awarded a sum in damages amounting to the original judgment of \$19,499.88 and costs, attorney's fees and expenses in efforts to collect the compensation awards which ran the

total up to \$31,208.66. The case is not as much in point as it would be if the City had not actually taken possession of and used the property. Nevertheless, it is important to note the attitude of the court, which said:

“The claim that the city had not incurred any general liability because it had not exhausted its power to levy and collect special assessments cannot be sustained, because the very basis and foundation of the action is that the city negligently failed to exhaust such power and on account of its negligence has incurred the liability.

“The decision in the *City of Chicago v. Thomason, supra*, that although the city acquired a vested right in the property and the owners a vested right in the compensation by the act of taking possession with the consent of the owners, yet the manner in which the payment of the compensation should be made was not changed and there was no jurisdiction in the statutory proceeding to enter an absolute judgment against the city for the amount of the awards, does not touch in any manner whatever either the question of the liability of the city for negligence in failing to perform its duty under the statute or the question whether the plaintiff would be entitled to interest from the time possession was taken.” *Mccartney v. City of Chicago*, 273 Ill. 276.

In the case of *Gray v. City of Joliet*, 287 Ill. 280, which is a case growing out of the present Local Improvement Act, it was held that the municipality is liable for the expenses of the proceeding such as engineering costs, the cost of spreading the assessment, etc., even if it abandons the proceedings. The court passes on some points which are before us when it says:

“We are referred to decisions of this court that a city cannot be made generally liable to a contractor by mere evasion or neglect of duty on the part of its officers to collect an assessment but he must look to the collection of the assessment for his money. * * * But where the city abandons the proceeding, as it has

a right to do, before it reaches the final stage of levying the assessment, a person like the commissioner having a claim for the preliminary work of preparing the assessment roll has no claim against any special fund, for no such fund is raised, and he has no remedy by mandamus to compel the city to levy the assessment, for the municipality has the lawful right to abandon the proceeding and not make the improvement. *Price v. City of Elgin, supra.*

"Without extending this discussion further, it is our conviction that while a city having a population of less than 100,000 may by ordinance, under the proviso to section 94, provide for the payment of the expense of levying an assessment from the fund produced by levying it, it cannot relieve itself from liability to pay the reasonable expenses incurred where the city itself voluntarily abandons and dismisses the proceeding before judgment of confirmation." *Gray v. City of Joliet*, 287 Ill. 280.

While this case involves a city of less than 100,000, the rule announced is the same in a city of more than 100,000.

It should also be noted that the liability of the City as to that part of the cost of an improvement which is to be borne directly and primarily by the City, there can be a general judgment against the City. *Shade v. City of Taylorville*, 212 Ill. App. 512.

From the authorities cited and others which we have examined, we have come to the following conclusions:

1. Where the ordinance declares that the improvement shall be paid for by a special assessment against the property benefited, a judgment in condemnation is not one that applies generally against the City, but the judgment creditor can compel the Council by mandamus to proceed with the collection.

2. Where the improvement is abandoned the City is liable for all preliminary costs and expenses.

3. Where the property is taken the City is liable to a general judgment.

4. Where the proceedings have not been abandoned but are not being diligently prosecuted, the owner of property may recover damages for such loss as the owner can prove, such as loss of rent, etc.

5. If the improvement is held up but not abandoned, the City may be held for damages considerably in excess of the original award.

(No. 6304—October 9, 1928—L. H.)

IMPROVEMENT ORDINANCES, REPEAL.

The City Council only upon written recommendation of the Board of Local Improvements giving reasons, may repeal a Local Improvement Ordinance at any time before final judgment of confirmation or after confirmation if the contractor gives his consent to same.

Hon. Oscar F. Nelson, Chairman, Committee on Judiciary and Special Assessments:

In response to your letter of recent date in which you call attention to the ordinance now pending before the City Council, seeking to repeal two ordinances for the improvement of North and South Halsted street, we submit the following:

You ask first concerning the power of the City Council acting independently of the Board of Local Improvements to pass this repealing ordinance and then you ask what the power of the Board of Local Improvements is acting

in conjunction with the City Council to repeal the ordinance for such improvement.

The City may repeal a local improvement ordinance at any time before final judgment of confirmation and it may repeal such ordinance after such confirmation if the contractor gives his consent to do so. The action must be taken, however, upon the recommendation of the Board of Local Improvements and the Board must state its reason for the repeal.

The statute controlling this was passed in 1901 (Cahill's Stat., 1927, p. 351), which reads as follows:

“No repeal of any ordinance ordering an improvement shall be made except on written recommendation of the board of local improvements (stating therein its reasons therefor).”

Final judgment has not been taken, and therefore the ordinances may be repealed.

(No. 6305—October 13, 1928—F. A. B., L. H.)

1 MOTOR BUSES AS FEEDERS, INFORMATION NECESSARY FOR ORDINANCE.

For the purpose of drawing an ordinance for the operation of motor buses as feeders, it is necessary to know the number of buses that are to be operated; the names of streets over which they are to travel; the rate of fare that is to be established; what arrangement, if any, shall be made with existing transportation systems; what plant, equipment and property is to be constructed or acquired; what provision is to be made for issuance of bonds, mortgages, certificates or special assessment bonds; and what other special provision is to be made with reference to the operation of such buses.

2 MOTOR BUSES OPERATION ORDINANCE, REFERENDUM.

An ordinance for the acquisition and operation of motor buses as feeders must be submitted to the qualified electors of the City of Chicago for approval and becomes effective only upon approval of a majority of those voting thereon.

*To the Honorable, the Committee on Local Transportation
of the City Council of the City of Chicago:*

On the 10th day of October, 1928, you submitted to us a resolution adopted by the City relative to the municipal acquisition of buses, and their operation as feeders to existing transportation systems, the said resolution being as follows:

“WHEREAS, The City of Chicago desires, for the proper accommodation of the public, to provide for the equipment and operation of a system of motor buses designed as feeders for the traction lines now in operation in said City and such as may hereafter be installed, and it will be for the best interests of the public that the City Council should control the rates of fare and the operation of such buses, which under the law can only be done by means of Municipal ownership and operation of the same; therefore, be it

“RESOLVED, That the City of Chicago should forthwith proceed to acquire such motor buses and equipment as may be determined by ordinance of the City Council, for the purpose of owning and operating such motor buses in connection with and as feeders to the transportation systems now in operation or hereafter to be installed or otherwise in accordance with law upon proper and lawful grants by said City Council of said City of Chicago; be it further

“RESOLVED, That the Corporation Counsel be and he is hereby instructed to prepare such ordinance or ordinances as may be necessary to carry into effect the purpose of this resolution and to submit the same to the City Council for appropriate action thereon ”

Will you be kind enough to instruct us in reference to the following:

(a) What kind and how many buses do you desire to operate?

(b) Over what streets in Chicago, and in what territory do you desire to operate them?

(c) What rates of fare do you wish to establish?

(d) What arrangement, if any, shall the City make with the existing transportation systems?

(e) What is the description of the plant, equipment, and property proposed to be acquired or constructed?

(f) What provision do you desire made for the issuance of bonds, mortgages, certificates, or special assessment bonds mentioned in said Act?

(g) What other special provisions do you desire in the ordinance relating to said buses and their operation?

Upon receipt of this information from you, we shall be pleased to prepare the ordinance, or ordinances, forthwith.

On the same day you submitted to this office the question as to whether a referendum would be required before the acquisition of motor buses, and before their operation was put into effect.

An "Act to authorize cities, villages, and incorporated towns to acquire, construct, own, and to lease or operate public utilities, and to provide the means therefor," found in chapter 111-A, at page 1966, of Cahill's Statutes 1927, section 3, provides:

"No city shall proceed to acquire or construct any public utility under the provisions of this act until an ordinance of the City Council, providing therefor, has been duly passed and submitted to the electors of such city, and approved by a majority of those voting thereon. Such ordinance shall set forth the action proposed, shall describe the plant, the equipment and property proposed to be acquired or constructed, and shall provide for the issue of bonds, mortgage certificates, or special assessment bonds, as hereinafter authorized."

In section 2 of this Act "public utility" is defined as follows:

"The term 'public utility' when used in this act means and includes any plant, equipment, or property, and any franchise, license, or permit used, or to be used, for or in connection with the transportation of persons or property, or the conveyance of telegraph or telephone messages."

Section 4 of said Act provides:

"No city shall itself proceed to operate any such public utility for the use or benefit of private consumers or users for hire, or charge for such compensation (consumption) or use, unless the proposition to operate shall first have been submitted to the electors of the city as a separate proposition and approved by a majority of those voting thereon."

It is clear therefore that the City cannot acquire motor buses and equipment for use in connection with and as feeders to the transportation systems now in operation, or hereafter to be installed, or otherwise, in accordance with the law, unless it complies with the terms of said Act, and submits to the qualified electors of said City of Chicago an ordinance providing for the acquisition and operation of such feeder buses, and secures the approval thereof by a majority of those voting thereon.

If you desire, we shall be pleased to confer with you at any time in relation to said ordinance, or ordinances.

(No. 6306—October 15, 1928—E. C. H.)

1 CHICAGO TELEPHONE COMPANY, CLASSIFIED TELEPHONE DIRECTORY, REGULATION.

The publication and management of the Chicago Classified Telephone Directory which is published and owned by a corporation other than the Chicago Telephone Company is not subject to public regulation either by the City Council or the Illinois Commerce Commission.

2 CHICAGO TELEPHONE COMPANY, FRANCHISE ORDINANCE, CLASSIFIED TELEPHONE DIRECTORY.

The Franchise Ordinance of November 6, 1907, to the Chicago Telephone Company provides for only one telephone directory which is the gray-covered alphabetical telephone directory now in use and is the property of the Telephone Company.

Hon. Donald S. McKinlay, Alderman, 19th Ward:

This department is in receipt of your recent letter with reference to the question whether or not the publication

and management of the Classified Telephone Directory, published by the Reuben H. Donnelley Corporation, is subject to public regulation by either the City Council or the Illinois Commerce Commission.

The City ordinance passed November 6, 1907, which granted the franchise to the Chicago Telephone Company, and which remains in effect until January 8, 1929, provides for a telephone directory as follows:

“Said Chicago Telephone Company shall, at least three times during each year, print, publish, furnish and deliver to each of its lessees and subscribers in Chicago, free of charge, a directory containing in alphabetical order the names, addresses and telephone numbers of all its lessees and subscribers in Chicago who have not requested in due time that their names be omitted. Said Chicago Telephone Company shall also when requested at the times before mentioned furnish and deliver to each of its lessees and subscribers an additional directory for each extension telephone contracted or paid for by said lessee or subscriber. Said Telephone Company shall include and list in each of said directories at the request or with the consent of any of its lessees or subscribers, in connection with the address and telephone number of such lessee or subscriber, free of charge, the names, in their proper alphabetical order, of not more than three partners, officers, employes or members of the family of such lessee or subscriber for each single or two-party line, contracted for by such lessee or subscriber, and make one such free listing for each four-party line and for each neighborhood exchange telephone, and also one more of such names for each extension telephone used by the said lessee or subscriber, and, in addition thereto, as many more of said names of users on the same premises as said lessee or subscriber (unless said lessee or subscriber is the lessee of or subscriber to a flat rate single party line at \$125 per year) may request, or consent to, upon payment to the Chicago Telephone Company of not more than \$3.00 per annum for each additional name so included and listed.”

Thus it can be seen that only one telephone directory is required by ordinance to be furnished by the Chicago Telephone Company. That is the gray-covered alphabetic directory now in use, which book is the property of the Telephone Company.

The situation with reference to the red-covered Classified Telephone Directory is fundamentally different. The Reuben H. Donnelley Corporation publishes, owns, and manages the Classified Directory as an independent proposition of its own. On October 15, 1927, the Donnelly Corporation and the Telephone Company entered into a contract concerning the publication of the Classified Directory. This contract provides for the manufacture of said directory by the Donnelley Corporation at its own expense. In consideration for the exclusive privilege of publishing this directory the Donnelley Corporation agreed to pay to the Telephone Company fifteen per cent (15%) of the gross billing for the advertising contained in the July, 1927, issue, and twenty per cent (20%) of the gross billing for the advertising contained in the January and July, 1928, issues.

The contract also provides that all subscribers who pay a business rate for service shall be listed once free of charge under a heading appropriate to the character of the business or profession of such subscribers, and that the subscribers are entitled to the same number of classified directories as they are entitled to alphabetic directories.

The Classified Directory is published by the Donnelley Corporation at its own expense and is its own property. The Telephone Company merely receives a revenue from the Donnelley Corporation in return for the grant of the exclusive privilege of publishing and owning the Classified Directory. The fact that a public utility, the Tele-

phone Company, receives an income from the publication and management of this directory which is owned by its publisher, will not subject the said publisher and owner to public regulation.

The Classified Telephone Directory cannot be said to be yielding a "profit" to the Chicago Telephone Company, as the directory is not owned by the Telephone Company.

We are therefore of the opinion that the publication and management of the Classified Directory are not subject to public regulation by either the City Council or the Illinois Commerce Commission. The fact that a public utility corporation receives an income from a project of a private corporation will subject neither such private corporation nor such project to public regulation.

(No. 6307—October 17, 1928—L. H.)

1 **ORDINANCE, WATER CERTIFICATES.**

An ordinance providing for the issuance of Water Certificates to avoid the necessity of its submission to a referendum, should be based upon the Act of July 8, 1927, and should specifically say that the certificates and coupons are payable only out of the water receipts; it is not enough to say that the certificates and coupons should be paid out of the income and resources of the water works system.

2 **WATER FUND, OBLIGATIONS.**

Obligations on account of the water works system are of two kinds—Water Loan Refunding Bonds and Water Certificates.

3 **WATER CERTIFICATES, PAYMENT.**

Water certificates are paid out of the proceeds from the water rates.

4 WATER LOAN REFUNDING BONDS, PAYMENT.

Water Loan Refunding Bonds are issued in place of matured water loan general liability bonds and are payable out of the Corporate Fund.

5 CITY COUNCIL, WATER WORKS SYSTEM.

It is the duty of the City Council as successor of the Board of Public Works under the Chicago Charter of 1863 as amended in 1867 to provide for the City a sufficient quantity of pure and wholesome water, and in the discharge of that duty the City Council has very broad and comprehensive powers.

6 CITY COUNCIL, REVENUE.

The power of the City Council to assess water rates and to levy taxes when necessary to raise revenue over and above the revenue of the water works is derived from the Charter of 1863 as amended.

7 MUNICIPAL INDEBTEDNESS, LIMITATION, EXCEPTION.

It is reasonable to assume that the provision in the Act of July 8, 1927, regarding the issuance of Water Certificates taking the certificates or bonds therein authorized out of the constitutional provision or limitation with reference to municipal indebtedness will be held valid.

8 CITIES AND VILLAGES ACT.

Article X confers power upon the City Council to borrow money to the extent of the limitation regarding all other indebtedness.

9 CHICAGO CHARTER OF 1863, NOT REPEALED.

The adoption of the Cities and Villages Act did not repeal the Chicago Charter of 1863 in so far as said Charter relates to the Chicago water works system and involves chapter 15 as amended in 1867.

Hon. George K. Schmidt, City Comptroller:

You made inquiry recently as to the authority under which the City may issue what have been designated as "Water Certificates," the obligation assumed by the City thereunder, and other matters concerning their status.

The City's water obligations are of two kinds—the Water Loan Refunding Bonds issued in place of the matured water loan general liability bonds, and the so-called Water Certificates which are designed to be paid out of the proceeds from water rates. The last of the Water Loan Refunding Bonds were authorized on May 17, 1915, the total amount now outstanding being approximately \$500,000, all of which are payable out of tax levies provided for in the ordinance authorizing their issuance. The last Water Certificates authorized were provided for by an ordinance passed May 28, 1928 (Council Journal, p. 2953), empowering the Mayor and Comptroller to execute and issue \$4,000,000 worth at a rate of interest not exceeding five per cent. These have not as yet been issued, and we understand you are waiting for this opinion before acting. The ordinance under which these certificates are to be issued says that the certificates and coupons “shall respectively call for and assure the payment of the money out of the income and resources of the Water Works System” and irrevocably pledges this income and resources for their payment. It does not say in terms that the water fund is the only source of payment, but it is clearly contemplated that the payment shall be out of that fund. If the certificates are to constitute a general obligation of the City they are in effect bonds with a pledge of the water income in addition to the general obligation, and they would in that case have to be submitted to a referendum. If it is the intention that they are to be payable only out of water receipts, we recommend that the ordinance and certificates be so worded that this is specifically stated. Otherwise questions may arise as to whether the obligation is general or not.

The water works system was built up originally by general taxation through a series of bond issues specifically

authorized by acts of the General Assembly. It will serve no useful purpose to go back to its inception and trace the various bond issues, since all these bonds have been redeemed and the whole subject of financing the water system was elaborately provided for by the Charter of 1863. We are in the habit of looking to these charter provisions as our authority for developing and financing the water system, although there have been many general laws passed since then which the City would avail itself of if necessary.

One of the reasons for relying on the provisions of the former charter to such an extent is that our Supreme Court, in the case of *People v. Hummel*, 215 Ill. 71, held that the provisions of the former charter with respect to the segregation of the water fund (and other matters) were not abrogated or repealed by the Cities and Villages Act. The court said in that case:

“The City and Village Act of 1872 contains no express limitation upon the use of money derived from the water-works of the city, but we are unable to find any provision in the latter enactment inconsistent with the limitations placed upon the use and disposition of that fund by the express provisions of said sections 13 and 32 of the charter of 1863.”

The sections 13 and 32 which the court thus held were still in force are only part of the provisions of chapter 15 of the Charter of 1863, the whole of which chapter is devoted to the subject of water and is headed “Chicago Water Works.” The said chapter, as amended in 1867, consists of 35 sections nearly all of which still remain effective. Such changes as have been made by the Cities and Villages Act are of minor importance, and as far as other acts are concerned, they are usually of such a nature that they add to but do not repeal the powers contained in chapter 15 of the former charter.

Under the charter just referred to the powers of the City with reference to water were vested in a Board of Public Works. This Board is now replaced by the City Council, but the powers vested in the Board and now exercised by the City Council remain the same except that they have been somewhat amplified by later enactments.

Referring to said chapter 15, we find that the Board of Public Works was charged with the duty of supplying the City with a sufficient quantity of pure and wholesome water, and to that end was given power to construct reservoirs, jets, hydrants, fountains, lay pipes in all streets and across all rivers and streams, to purchase and convey real estate, to purchase, hold and convey all necessary personal property, to construct buildings, machinery and fixtures to furnish a full supply of water for public and private use, to purchase books, charts, and other works necessary or useful and to make surveys and for that purpose to enter upon lands and agree as to damages, to condemn property, to build aqueducts, to extend pipes into the lake, erect piers, and to do a great many other things specifically mentioned, and general powers are also included which are most comprehensive.

With respect to financing, the Charter of 1863 conferred power to assess water rates, to levy a tax when necessary to raise revenue over and above the revenue of the water works, to make temporary loans, etc. Following the established practice of authorizing specifically the issuance of bonds, provision is made in this Charter for the borrowing of not to exceed \$500,000 from time to time as necessary, and the issuance of bonds therefor "pledging the faith and credit of said City for the payment of the principal and interest." No specific provision is made for the issuance of water certificates in addition to the bonds, although it would not be hard to discover implied authority in the

broad powers delegated in the Act. The passage of the Cities and Villages Act in 1872 had the effect of enlarging the power to issue bonds beyond the limit of \$500,000. By article X the City was given power to borrow money for the purposes of the water system with no other limitation except that imposed for all other indebtedness. Aside from this, there was nothing in that Act which enlarged the powers of the City with respect to the water works.

There were numerous acts passed after the adoption of the Cities and Villages Act which gave powers to municipalities in relation to the water supply, but none, until more recently, seemed particularly applicable to the City of Chicago. In fact, in most instances, the City would have been compelled to take special proceedings in order to avail itself of the provisions of these acts, which when secured would have been of no value to it.

The first Act, so far as we can ascertain, that expressly authorized water certificates as distinguished from bonds, was passed in 1899. (Smith's Stat., 1927, p. 418.) Section 1 of said Act reads as follows:

"Every city, incorporated town and village in this State, is hereby authorized to acquire water works for supplying water for public use, and for domestic use of its inhabitants by building or purchasing a water works system or enlarging or extending an existing system. In payment for such building, purchase or enlargement any such municipality may issue certificates of indebtedness limited in their payment solely to the water fund hereinafter provided for; such certificates may bear interest at a rate of not exceeding six per centum per annum, payable semi-annually, and shall only be issued at not less than par value in payment for the building, purchase or extension of a water works system."

The Act just quoted from authorizes the mortgaging of the water works system to secure the payment of the water certificates. While the Act was probably not designed for the City of Chicago, and there are certain formalities that must be observed that the City of Chicago has not been observing in the issuance of water certificates, nevertheless the City can avail itself of the provisions of this Act if it sees fit. Another Act under which the City of Chicago would be authorized to issue water certificates is the Public Ownership Act passed in 1913. (Smith's Stats., 1927, p. 2159.) A more recent Act, however, seems better adapted to the needs of the City of Chicago. This was the Act approved July 8, 1927, which at first blush seems designed for smaller municipalities, but which, upon further analysis, seems well adapted to the needs of the City of Chicago.

The Act of 1927 provides for financing betterments and improvements of water works systems, and states that it "shall be construed as cumulative authority for the purchase or construction of a water works system or for the construction of betterments and improvements thereto, and shall not be construed to repeal any existing laws with respect thereof." The Act contemplates the issuance of bonds payable solely from the revenues derived from the water works system, which "shall not in any event constitute an indebtedness of the municipality within the meaning of the constitutional provisions or limitations." This must be plainly stated on the bond. The bond is secured by a lien on the water system. Any holder of a bond may enforce the statutory lien or compel the performance of the duties of officials in connection therewith. The statute further provides that water rates shall not be reduced until all bonds are paid, and may be increased whenever necessary to provide the revenue required for

principal and interest and for depreciation account and charges for operation and maintenance. The Act also provides for a system of accounting that will ascertain the amounts necessary for maintenance and for the redemption of the bonds and the payment of interest, and requires sums for redemption and interest to be set aside. There is also a provision for refunding.

The Act of 1927 seems to be better adapted for the needs of the City of Chicago than the Act of 1913 which provides for municipal ownership of public utilities. Under this latter Act provision is made for the submission of the ordinance providing for the issuance of bonds to a referendum, although it would seem that this is necessary only when the enterprise is first proposed and is not necessary when extensions or betterments are to be made. See sections 3 and 4.

Up to January 1, 1928, there were authorized and outstanding \$11,000,000 of water certificates which had been issued from time to time, without particular reference to any legislative act. It is to be presumed that the authority for them is found in the Act of 1899 above referred to, but some of the formalities required under said Act do not appear to have been observed, notably that requiring a referendum.

As already stated, on May 28, 1928, the City Council passed an ordinance purporting to authorize the issuance of \$4,000,000 of water certificates. It appears that \$750,000 worth of these have already been sold. These stand on the same basis as the certificates issued prior to that. We do not deem it advisable, however, to issue more of these until the Council has re-enacted the ordinance in such form as to comply with the requirements of one of the three statutes under which water certificates may be issued. Our recommendation is that the Law of 1927 be

selected as the one under which to proceed. Our reasons for this are, first, there will be no referendum required; second, the fact that these securities are designated by statute as "bonds" instead of "certificates" makes them more readily marketable; and, third, the provision for redemption is precisely defined and will result in the automatic retirement of the bonds if strictly observed, thus enhancing the safety of the bonds. We cannot foretell how the provision taking such bonds out of constitutional provisions or limitations will be construed, but there is at least reasonable ground for assuming that such water revenue bonds will not be included in the debt limitation.

Should you decide to submit a new ordinance to the City Council it will probably be necessary to call upon us for a further elucidation of the formalities prescribed by the statute.

(No. 6308—October 18, 1928—F. J. V.)

1. ANNEXED TERRITORY, POLICEMEN AND FIREMEN, STATUS AND SALARY.

Policemen and firemen lawfully in the employ of a municipality at the time of its annexation to the City of Chicago become a part of the Police and Fire Departments of the City by virtue of the annexation without examination for entrance into its Civil Service, and are entitled to the same salary and compensation as is paid to policemen and firemen of the City of Chicago.

2 CIVIL SERVICE EMPLOYEES, TERM OF OFFICE.

There are no fixed terms of office under the Civil Service Law but all employees in public service hold their offices and positions for life, or so long as such offices or positions continue in existence, subject only to discharge under the provisions of section 12 of the Civil Service Act.

3 CIVIL SERVICE LAW.

Section 6 of the Civil Service Law is inapplicable to policemen and firemen of territory which becomes a part of the City of Chicago by virtue of annexation.

4 WORDS AND PHRASES.

The words "hold over" when applied to an officer, implies that the office has a fixed term which has expired and the incumbent is holding into the succeeding term. Policemen and firemen who become part of the City's Civil Service through annexation of territory are not hold overs.

To the Honorable, the Civil Service Commission:

We have the official letter of the Secretary, James S. Osborne, with enclosure of a communication addressed to the Commission, requesting an opinion "as to the civil service standing of former employees of territory annexed to the City of Chicago"; also requesting us to define the term "hold over."

To the general proposition here submitted there should be applied two opinions recently given by the Corpora-

tion Counsel, namely: One of June 15, 1927, advising the Commission "what action should be taken in the matter of the report from the Superintendent of Police covering appointment of three patrolmen (hold overs) on account of the annexation of Mount Greenwood, Illinois"; the other opinion of June 16, 1927, to Michael Hughes, Superintendent of Police, "as to what salary should be paid" to the three patrolmen coming from Mount Greenwood. In the first of these opinions we said:

"This case is governed by paragraph 402 of chapter 24, page 281, Smith's Statutes, 1923, which paragraph provides that:

" 'All policemen and firemen lawfully in the employ of any city, village or incorporated town, the whole of which may be annexed to another, as provided in this act, shall be transferred to and become a part of the police and fire department force of such city, village or incorporated town.' You will treat these appointees in the same manner as new patrolmen who are originally certified and appointed from the eligible lists in the office, also placing them on the roster of patrolmen of the City of Chicago and certifying them in like manner upon the regular payroll."

In reference to the salary to be paid these patrolmen, who become such by way of the annexation statute above quoted, we said, in the second opinion:

"By virtue of this statute the new patrolmen are entitled to the same salary and compensation as is provided by the City Council for Chicago policemen who originally enter the police service of the City of Chicago."

These opinions are already authority in support of the general proposition that policemen and firemen transferred by annexation of any city, village or incorporated town assume the same status as the policemen and firemen in the town or city to which they are transferred. The

Legislature has so declared in language plain and unequivocal. Paragraph 402, chapter 24, *supra* (Annexation Act approved April 25, 1889, sec. 17). The language of section 17 of the Annexation Act is that policemen and firemen of the annexed territory "*shall be transferred to and become a part of the Police and Fire Department force of such city* (to which the territory is annexed)." By this Act the Legislature has unconditionally transferred to and made part of the Police and Fire Departments of the City all policemen and firemen who were at the time lawfully in the employ of the annexed territory. They were not transferred to and constituted part of the Police and Fire Departments of the City upon any condition first to be complied with, such, for instance, as application and examination for entrance into the Civil Service. Had the Legislature so intended, such intention would have been expressed. There is not even an implication of such intention in the language of the Annexation Act, particularly said section 17 thereof. Nor is there anything to warrant even the suggestion that the policemen and firemen so transferred to and made part of the City's departments are to have a status or character other or different from that of the policemen and firemen who already make up such departments. Nor that their rights and benefits shall be limited to a class by themselves, and not be equal to those of other members of the same departments. A case in point here, we think is the decision of the Appellate Court which holds that:

"Under Hurd's Rev. St., sec. 17, ch. 24 (J. & A., Par. 1654), providing for the transfer of firemen and policemen upon organization of a municipality out of part of another, where a fireman was in the employ of a town out of a part of which a new village was organized to which he was transferred, his time as fireman of the town will be added to his time as fireman of the village, for the purpose of computing

the 20 years of service required to entitle him to a pension, under section 7 of the Firemen's Pension Fund Act. (Callaghan's 1920 Stat., Par. 1904 (21).)" *People ex rel. v. Board of Pension Trustees*, 220 Ill. App. 242.

Section 6 of the Civil Service Act provides that "all applicants for offices or places in said classified service, except those mentioned in section 11, shall be subjected to examination." This does not apply to the policemen and firemen coming from annexed territory, first, because they are not "*applicants*" for places in the civil service; secondly, because the Legislature enacted the Civil Service Law to provide that "all applicants" for the civil service should be subjected to examination, and also enacted the Annexation Law to provide that "all patrolmen and firemen," upon the sole condition of annexation, "shall be transferred to and become part of the police and fire department forces" of the City to which annexation is made. Both are valid laws and both must be enforced. Being thus directly related to the same subject-matter they are *in pari materia* and must be construed together. Thus construed the law is that all who would enter the civil service must become applicants and submit to examination except policemen and firemen lawfully employed by a city, village or incorporated town which is annexed to another, who shall be transferred to and become part of the classified Police and Fire Department forces of said city by reason of such annexation alone.

It was as much within the power of the Legislature to except from the provisions of section 6 of the Civil Service Act policemen and firemen coming into the City's service by annexation as it was to "except those mentioned in section 11," of the Act,

Now there is but one class of policemen and firemen in the City of Chicago, as determined by the Civil Service Act. All members "of the Police and Fire Department force of such city" are in the "classified service." Therefore, the expressed intention of the Legislature can be carried into effect only when the policemen and firemen of the annexed territory are "transferred to and made part of the (classified civil service) Police and Fire Department force of such city."

The policemen and firemen, becoming such by way of the Annexation Act, are in the same position and are similarly affected as were all the employees of the City at the time of the adoption of the Civil Service Act. These employees, by virtue of the Civil Service Law, "were transferred to and made part of the" classified civil service of the City. Thereafter their status, rights and obligations in the public service were determined by the Civil Service Law. So it is with the policemen and firemen coming to the service of Chicago by annexation of their former territory.

As said by the Supreme Court in the case of *People ex rel. v. Coffin*, 282 Ill. 599, at page 610, "the civil service law is necessarily a part of the contract of employment of every civil service employee." Those coming into the service by annexation of territory are entitled to their respective places on the rosters of those holding the offices or positions in that department and on the same payrolls of that department. They are entitled to participate in all promotional examinations for the next higher grade or rank of service, as the case may be, and are entitled to certification and appointment to the higher places as any others in the same service. It was so considered in the case of those appointed prior to the Civil Service Act. *Ptacek v. People*, 194 Ill. 125, 128.

In short, no distinction can lawfully be made for any purpose under the Civil Service Act between policemen and firemen coming into the service by way of the Annexation Act and those qualifying for such service according to the Civil Service Act itself.

We are asked to define the term "hold over." We may say at the outset that the term has no application whatever to the general subject-matter to which this opinion applies. "Hold over," when applied to an officer, implies that the office has a fixed term, which has expired, and the incumbent is holding into the succeeding term. (Vol. 4, Words & Phrases, p. 3318; 21 Cyc., p. 439.) It seems that the term was applied to those who were in the service by virtue of appointment prior to the adoption of the Civil Service Act. (*Ptacek v. People*, 194 Ill. 125 128.) They were not by that decision held to be hold overs. The opinion merely says that two inspectors were called "hold overs." But even these so-called hold overs were in the classified service.

This term does not apply to policemen and firemen who become such by the Annexation Act, for by the very fact of annexation the municipality in which they held office lost its legal entity and ceased to exist, and there were, therefore, no offices in which they could "hold over." And coming into Chicago as new officers by annexation, there are no offices here in which they can be said to be "hold overs." Furthermore, by virtue of the Civil Service Act there are no fixed terms of office. All employees in the public service, if they so choose, hold their offices or positions for life or so long as such offices or positions continue to exist, subject only to discharge under the provisions of section 12 of the Civil Service Act. There being no fixed terms of office to expire, it would be as im-

possible for an officer to become a "hold over" as it would be for a life-tenant to "hold over."

Where there is no fixed term of office there can be no holding over. *State v. Simon* (Oreg.), 26 Pac. 170.

We trust the foregoing supplies all the information and opinion you have requested.

(No. 6309—October 23, 1928—G. F. M.)

1 WIDOW'S PENSION, FLORENCE HOGAN.

Florence Hogan as widow of Thomas F. Hogan is entitled to a widow's pension, since her marriage took place after the repeal of the prohibitive clause of the Divorce Act.

2 DIVORCES, MARRIAGE.

Between 1905 and 1923 in Illinois divorced persons were not permitted to marry within a year, and in case the divorce was granted on account of adultery then within two years after securing divorce, but June 30, 1923, this restriction was removed.

Retirement Board, Policemen's Annuity and Benefit Fund:

Replying to your request for an opinion as to the validity of a marriage occurring within less than one year subsequent to divorce, the following is submitted:

Your letter states that Mrs. Florence Hogan, widow of Thomas F. Hogan, has filed an application for widow's pension; that Thomas F. Hogan died September 23, 1928; that at the time of his death he was receiving duty disability benefit; that he was placed on the roll of duty disability beneficiaries in March, 1922, after seven years

and nine months of service in the Police Department; that the records show that Hogan was divorced from his first wife on September 30, 1925, in the court of Judge Harry A. Lewis in Chicago, Cook County, Illinois; that Hogan married the present applicant on October 7, 1925. Your question is as to the legality of the second marriage.

In 1905, section 1 of the Divorce Act of Illinois was amended to provide that no divorced person could legally marry within one year after the granting of the divorce unless the divorce was on the ground of adultery, in which latter event the guilty person could not remarry within two years after the granting of the divorce. This amendatory section was known as section 1-a of the Divorce Act and was repealed by Act approved June 30, 1923. Laws 1923, p. 327.

At the session of the Legislature held in 1923 there was also passed an Act validating marriages contracted in violation of section 1-a of the Divorce Act, if such marriages were otherwise legal and if such marriages had not been followed by a subsequent and later marriage contract which was legal and binding under the law as it then existed. Smith's Stat., 1927, p. 1046.

I am of the opinion that the marriage between Thomas F. Hogan and Florence Hogan, having been entered into subsequent to the repeal of the Act affecting the remarriage of a divorced person, was a valid marriage and that Florence Hogan is now the legal widow of Thomas F. Hogan, deceased.

(No. 6310—October 25, 1928—L. H.)

RIVER IMPROVEMENT BONDS, TRANSFER TO BEARER.

Chicago River Improvement Bonds registered in the name of the Auditor of Public Accounts in trust for a certain party cannot be transferred to bearer without such party's written consent.

Hon. George K. Schmidt, City Comptroller:

Your letter of the 24th instant, concerning the registry of certain river improvement bonds, to which was attached two letters from the Harris Trust & Savings Bank, and a release from the Auditor of Public Accounts, is before us.

It appears that on October 2, 1928, on the request of the Harris Trust & Savings Bank, you registered certain Chicago River Improvement Bonds as to payment of principal only in the name of Oscar Nelson as Auditor of Public Accounts in trust for Bills Trust Company. At a later date you received another request from the Harris Trust & Savings Bank, asking you to transfer on your books so that the bonds will be payable to bearer. The bank enclosed a release from the Auditor of Public Accounts, under which it set over to the Bills Trust Company all his right, title and interest in these bonds. The Bank did not, however, send any document from the Bills Trust Company which indicated that they were willing to have the bonds transferred so as to make them payable to bearer. The question you ask is whether you have sufficient authority to transfer the bonds to bearer.

We are of the opinion that in order to relieve yourself of all responsibility with respect to this transfer, you should have a release or at least some letter or other instrument in writing from the Bills Trust Company, which

declares that it is satisfied to have the bonds so transferred. We recommend that you procure such an instrument or writing before you make the transfer.

(No. 6311—October 25, 1928—L. H.)

DUPLICATE VOUCHER, ISSUANCE.

No duplicate voucher should be issued unless there is proof of loss of the original before a court and an indemnifying bond for double the amount of the voucher is furnished in accordance with section 14 of the Negotiable Instruments Law.

Hon. Edward J. Glackin, Secretary, Board of Local Improvements:

We are in receipt of your letter concerning the issuance of duplicate vouchers on contracts performed by James J. Renn, deceased.

It appears from your letter that James J. Renn was a contractor and that there were certain vouchers issued to him during his lifetime. These vouchers were made payable to his order and delivered to him by the Comptroller, but they have not been presented for payment.

His administratrix, Mrs. Brigid Renn, now states that the vouchers are lost; that she has made diligent search to find them but is unable to trace them, and believes that Mr. Renn lost them, and that they were not used during his lifetime. She demands payment of the vouchers to her, as administratrix, and says she will furnish the City, if required to, with a reasonable bond to indemnify it against possible loss by reason of said payment.

In cases of this kind our advice has always been that the party who lost the instrument and seeks payment should proceed under section 14 of the Negotiable Instrument Act. That section clearly sets forth the manner of proceeding against the City. It reads as follows:

“In any action founded upon any note, bond, bill, or other instrument in writing, or in which the same, if produced, might be allowed as a set-off in defense, if it shall appear that such instrument was lost while belonging to the party claiming the amount due thereon, to entitle him to recover upon or set off the same, he may, in the discretion of the court, be required to execute a bond to the adverse party in a penalty at least double the amount of such note, bill or instrument, with sufficient security, to be approved by the court in which the action is pending, conditioned to indemnify the adverse party, his heirs, executors and administrators against all claims by any other person on account of such instrument, and against all costs and expenses by reason thereof.”

By proceeding in accordance with the statute, the owner of the lost instrument can recover, and at the same time the officers of the City are protected against loss. We do not ordinarily recommend the issuance of duplicate vouchers, and that has been resorted to only in extreme cases which are so unusual that the remedy pointed out herein is not available. In the present instance there is no reason why section 14 should not be followed.

(No. 6312—October 26, 1928—L. H.)

1 CITY COUNCIL, COMPROMISE OF CLAIMS.

Under the power to control the finances of the corporation, the City Council has power to adjust and settle claims arising from a change or modification of a contract with the City.

2 CONTRACTS, CHANGE OF, EFFECT UPON SUBCONTRACTOR.

Ordinarily a subcontractor has a right to assume that a contract entered into by the City will be carried out in accordance with its terms, and if the City Council makes changes in such contract which result in loss to the subcontractor, the City will recompense him for the same.

Hon. Richard W. Wolfe, Commissioner of Public Works:

We are in receipt of your letter of recent date in relation to the proposed change in pavement on the new La Salle Street bridge. From this it appears that you found it desirable to change the contract for the structure so that asphalt plank pavement could be substituted in place of the rubber block pavement required by the specifications. On this matter the City Council took appropriate action on July 11, 1928 (Council Journal, p. 3344), authorizing you to make the change and to accept a credit of \$11,692 from the contractor in settlement for the reduced cost of the substituted materials and workmanship. It now appears further, from your letter, that the manufacturer of the rubber block, who was entitled to the work of laying the rubber block pavement under a subcontract, will make a claim for recompensation for loss by reason of the cancellation of the subcontract and the drop in price of rubber which had been ordered for the purpose. You state that the matter has been thoroughly investigated by your department, and that the sum of \$3,000 has

been fixed upon as the actual loss sustained by the rubber manufacturer for which he should be reimbursed. You also say that it is your intention to recommend the payment of this claim and to that end request the City Council to so amend the order of July 11th so as to reduce the credit to be allowed the City for the change from \$11,692 to \$8,692, thereby making it possible to satisfy the claim of the subcontractor.

You ask for our opinion as to the legality and propriety of the procedure thus outlined.

What you propose is proper, and it is practically the only way in which you can legally proceed. It is within the discretion of the City Council to make such allowance as may be deemed proper to reimburse the City for the change in pavement. Under its power to control the finances of the corporation, it also has power to adjust and settle claims of the kind that has arisen. In order to do this it may amend the order making the adjustment which was passed on July 11th or it may pass a new order authorizing the payment of the \$3,000 directly to the subcontractor. Inasmuch as there is no privity of contract between the City and the subcontractor, the amendment of the order of July 11th is by far the better way of handling the situation.

It will be understood, of course, that in passing on the legal phases of the proposed action we do not undertake to say whether or not the claimant is entitled to any compensation or how much he is entitled to. The question of whether he is entitled to any compensation may involve a legal question, but it is primarily a question of fact which you state you have inquired into. In a general way it may be said to be the law that the subcontractor has the right to assume that a contract entered into by the City will be carried out as agreed upon, and that if the

City makes any change which results in loss to such subcontractor it must recompense him. If that statement of the law does not fully cover the situation it will be necessary to submit the documents, including contract, subcontract, price lists and all correspondence, to us for further consideration.

(No. 6313—October 27, 1928—L. H.)

CONTRACTS, PAYMENT.

Payment may be made to a contractor upon architect's certificate as to amount of work performed accompanied by voucher of head of department without securing waivers from subcontractors in case of public buildings, as the liability to subcontractors is protected by the contractor's bond for faithful performance.

Hon. George K. Schmidt, City Comptroller:

We have before us your letter of recent date in which you inquire whether it would be safe to make payments on architect's certificates of work performed on the new Central Police Station, or whether it will be necessary to secure waivers from subcontractors and materialmen before payment is made.

The approved method of procedure in the case of a private party having a building erected is to secure such waivers, but this has not been deemed necessary in the case of contractors for public buildings, because the contractor under the law must give bond for the faithful performance of his contract.

Under section 3267 of the Chicago Municipal Code of 1922 the contractor must furnish a bond with good and

sufficient sureties in an amount which will not only be adequate to insure the performance of the work in the time and manner required but also to save and indemnify and keep the City harmless against all liabilities, judgments, costs and expenses which may in anywise accrue against it as a result of the making of such contract.

This provision of the Code and the taking of bonds in conformity therewith have in the past protected the City, and it would take an extraordinary situation to result otherwise. It frequently happens that lien claimants appear before the last money is paid over to a contractor, but under such circumstances the City is in a position to protect itself, and if such a case should arise that would cause a loss, the bond would be sufficient to indemnify the City.

We therefore recommend that when such certificates are accompanied with the necessary voucher from the head of the department they should be honored as they have always been.

(No. 6314—November 1, 1928—M. H. F.)

1 FEDERAL HIGHWAYS FUNDS, CITY OF CHICAGO NOT ENTITLED TO PARTICIPATE.

Under present legislation, the City of Chicago is not a participant in Federal funds given to the State of Illinois for highway construction purposes.

2 FEDERAL AID ROADS, STREETS IN CITY OF CHICAGO NOT PART OF.

Streets or highways in municipalities of 2,500 or more, except portions within a distance of one mile where houses average more than 200 feet apart are not included within the Federal Aid Roads. This includes streets in the City of Chicago, except portions of streets and highways coming within the prescribed distance of miles.

3 STREETS AND ALLEYS, FEDERAL OR STATE AID.

In the matter of building and maintaining streets and highways within the City of Chicago the municipality is left free from either Federal or State aid, notwithstanding the fact that City streets are in law State highways over which the State has paramount control.

Hon. John J. Hoellen, Chairman, Sub-Committee, Committee on Efficiency, Economy and Rehabilitation:

You ask the opinion of this Department "as to the rights and legality of securing from the State of Illinois a portion of the funds received by the State from the Federal Government on account of the Federal aid roads in Chicago."

We take it that the gist of your inquiry is whether the City is entitled to demand and receive from the State a portion of the Federal Government funds allotted to the State for the purpose of building Federal aid highways within the State.

It is our understanding that payments to States of Federal aid are made only under and by virtue of the Federal Aid Road Act of July 11, 1916, as amended, known as the Rural Post Roads Act, and the Federal Highway Act of November 9, 1921, the Act passed for the purpose of carrying out the provisions of the Rural Post Roads Act. Section 2, chapter 1 of this later Act (November 9, 1921, ch. 119, sec. 1, 42 Stat. 112) provides in part as follows:

“When used in this chapter, unless the context indicates otherwise—

“The term ‘highway’ includes rights of way, bridges, drainage structures, signs, guard rails, and protective structures in connection with highways, *but shall not include any highway or street in a municipality having a population of two thousand five hundred or more as shown by the last available census, except that portion of any such highway or street along which within a distance of one mile the houses average more than two hundred feet apart.*”

The underscoring is ours. This definition of the term “highway,” as used in the Act, seems to eliminate all of Chicago’s streets except those along which within a distance of one mile the houses average more than 200 feet apart. By other provisions contained in the Act, Federal monetary aid is restricted and confined to Federal highways, as above defined. The whole plan of the Act is that of Federal aid to the State in the State’s road building projects, which are carried on by the State’s Highway Department, and subject to the approval of the Federal Government, and the giving of which aid is conditioned upon the State in turn furnishing its part of the cost and assuming expense of maintenance. In approving projects to receive Federal aid the Secretary of Agriculture is required to give preference to such projects as will expedite the completion of an adequate and connected sys-

tem of highways, interstate in character; and before any projects are approved, the State, through its State Highway Department, is required to select or designate a system of highways upon which system all Federal aid apportionments shall be expended. Highways are divided into two classes, (1) primary or interstate highways, and (2) secondary or intercounty highways. The Secretary of Agriculture is given authority to approve in whole or in part the systems designated or to require modifications or revisions thereof, also to approve the character of construction, improvement, repair and maintenance. When the State meets the requirements of the Act then the Federal monetary aid is forthcoming. There appears to be nothing in the Act which gives a City any direct interest in or control over any of the Federal funds paid to the State.

We have also examined such State laws as might have a bearing upon your question, but are unable to find any one which would give the City of Chicago an interest in such funds.

The Legislature of Illinois by Act approved June 27, 1917, with later amendments, has assented to the provisions, terms, conditions and purposes of the aforesaid Acts of Congress, and pledged the good faith of the State of Illinois to make available funds sufficient to equal the sums appropriated to the State by the United States, and to maintain the roads constructed under the provisions of said Acts of Congress. By an Act approved June 22, 1917, the Illinois Legislature provided for the construction of a State-wide system of durable hard-surfaced roads upon public highways of the State to be paid for by an issue of bonds of the State of Illinois. By this Act a bond issue for \$60,000,000 was provided for and some forty-six routes were described and established, routes numbered

4, 5, 6, 18, 19, 21 and 42 beginning at certain designated territorial limits of Chicago and affording the City connections with other designated Illinois cities and towns and the intervening communities.

By a Second State Bond Issue Act, approved June 29, 1923, an amount of \$100,000,000 was provided for to complete the roads described as Routes 1 to 46, inclusive, above mentioned, and to construct additional routes numbered 47 to 185, inclusive. Of these added routes, those numbered 49, 50, 54, 55, 57, 60, 62 and 63 afford connections with Chicago. No one of these 185 routes passes through the City of Chicago.

By an Act in relation to the construction of durable hard-surfaced roads in cities, villages and towns and making appropriation therefor, approved June 11, 1925, the State Department of Public Works and Buildings was authorized and directed to construct and maintain hard-surfaced roads within the corporate limits of cities, villages and towns upon the routes designated as Routes 1 to 46, inclusive, in all cases where the streets or other thoroughfares from the corporate limits where the route enters the municipality were not paved, so as to make a continuous hard-surfaced road through the municipality or if the municipality was the terminus of said route, to such point within the corporate limits as would best serve traffic interests upon said route.

By another Act approved June 11, 1925, and amended July 7, 1927, provision was made for refunds to cities, towns and villages having a population of 7,500 inhabitants or less, on account of durable hard-surfaced pavements constructed within the corporate limits by such municipalities to complete or connect State bond-issue roads forming a part of the routes designated as Routes 1 to 46, inclusive.

By an Act approved June 24, 1921, there was established a so-called system of State highways comprising the highways constructed, or authorized to be constructed by the State and Federal Governments, known as "Federal Aid Roads," and certain other designated roads. The State Department of Public Works and Buildings was charged with the administration of this Act and given specific and general powers to determine and adopt rules, regulations and specifications and to enter into contract covering all matters and things incident to the location, construction, repair and maintenance of State highways, etc.

We find nothing in the State enactments which provides for the construction or maintenance of any roads within the City of Chicago or for defraying the cost thereof. The matter of building and maintaining Chicago's thoroughfares is left to the municipality, and apparently without financial aid from either the Federal Government or the State of Illinois, except such aid as shall come to the municipality through the disposition of fines imposed under the State Motor Vehicle Act, and not material for discussion in this opinion. This appears to be true, notwithstanding the fact that the streets of the City are in law State highways over which the State has paramount authority and control. The City, as a creature or instrumentality of the State, has been given by the Cities and Villages Act (chap. 24, Smith's Statutes, 1927) broad powers to levy and collect taxes, to borrow money for corporate purposes, and issue bonds therefor, and to make local improvements, including the construction and maintenance of thoroughfares. Because of these powers granted to it, the cost of construction and maintenance of the City's streets is left to the municipality.

It is, therefore, our opinion that the City of Chicago can accomplish little or nothing towards securing for the municipality's direct use or application any Federal funds given to the State of Illinois for highway construction purposes.

(No. 6315—November 1, 1928—L. H.)

1 CLAIMS AGAINST CITY, ECKHART MILLING CO. REFUND.

The claim of Eckhart Milling Co. for refund of the value of a water main or pipe found in the vacated portion of Arbor place has no merit.

2 VACATION ORDINANCE, FIXTURES IN STREET NOT INCLUDED.

An ordinance which merely authorizes the vacation of a street upon payment of a certain sum as compensation is not like a conveyance of real estate, and does not include fixtures such as a water main which might be found in the street vacated but which was not mentioned in the ordinance.

3 RECEIPTS, RIGHTS LIMITED TO AUTHORITY CONFERRED.

A receipt for money paid as consideration for the vacation of a street by ordinance which receipt goes beyond authority conferred by the ordinance is not binding upon the City.

Hon. Richard W. Wolfe, Commissioner of Public Works:

We are in receipt of your letter of recent date relating to the claim made by the B. A. Eckhart Milling Co. for refund of the money paid for water pipe in the vacated portion of Arbor place. You ask us to give you an opinion as to whether or not the amount received from this company for the value of the water pipe should be re-

funded, and if so from what fund the money should be paid. Attached to your letter is a copy of a letter of the B. A. Eckhart Milling Co. addressed to Alderman Van Norman, in which request is made for the refund, and a statement is presented setting forth the Company's side of the controversy.

It appears that Arbor place from Ogden avenue to Sheldon street was vacated under an ordinance passed by the City Council on May 12, 1926. (Council Journal, pp. 3387-8.) The compensation fixed in the ordinance to be paid by the B. A. Eckhart Milling Co. was \$52,091.36. The letter of the Company states that this amount was paid and it holds receipt dated June 4, 1926, for the same. The receipt reads as follows: "Compensation for any rights the City of Chicago may have in and to any of the property involved in case for which decree was entered in Circuit Court—Percy B. Eckhart *vs.* Eckhart Milling Co. and others, No. B-121693, Chancery." It is assumed by the Company that this receipt is conclusive on the point that any rights the City had were paid for in full.

It seems that a six inch water main was allowed to remain in the street thus vacated. There was no mention made of it in the ordinance vacating the street. In June of this year, the Eckhart Milling Co. started to build alongside of the vacated street and found it necessary to have water service in the new buildings. For this purpose it was essential that the City water employees should cut off the pipe and cap it. This they refused to do unless the sum of \$593.25 was paid to the City as the value of the pipe, and in addition thereto the sum of \$200 was paid for the cost of cutting and capping the mains. The company agreed to pay for the cost of cutting and capping, but put up the remainder with the understanding

that it would be claimed back later on. It now insists that this sum of \$593.25 is due from the City.

It is possible that technically the Eckhart Milling Co. is right in its contention, although it is doubtful whether even under a strict technical construction of the ordinance and the subsequent correspondence, a claim of this kind will stand.

The ordinance stated that the vacation was made upon the express condition that within sixty days after its passage the B. A. Eckhart Milling Co. should pay to the City of Chicago "as compensation for the benefits which will accrue to the owner of the property abutting said parts of said streets hereby vacated" the sum of \$52,091.36, which sum was stated in the ordinance to be the judgment of the City Council as to the value of such benefits.

We do not think that the ordinance justified the giving of a receipt to the effect that this amount was compensation for any rights that the City of Chicago may have had in and to the property involved, and therefore the receipt went beyond the authority conferred by the ordinance, and is not binding on the City of Chicago. The real question is whether the vacation ordinance itself contemplated that there should be a transfer of the fixtures in the street for the money paid. We do not believe that was the intention of the City Council and we are forced to construe the language we quoted from the ordinance as merely authorizing the vacation of the street. It is probable, from all the circumstances, that it was not known at the time that there was a water pipe that would figure in the transaction. When it was discovered it was not to be treated as having been conveyed by the City. A vacation of a street is not like a conveyance of real estate in fee simple.

We are therefore of the opinion that the money paid for the water pipe should be retained.

(No. 6316—November 1, 1928—L. H.)

1 MUNICIPAL EMPLOYEES, PENSION AND SALARY, PAYMENT.

A salary cannot lawfully be paid to a municipal employee in addition to a pension.

2 MUNICIPAL FUNDS, DONATION OR GIFT.

A municipality is without power to donate or give away its property or funds.

Hon. George K. Schmidt, City Comptroller:

Your letter of recent date in relation to proposed payment to Henry, W. E. Kerr, Chief of Battalion, was referred to the writer for consideration and reply.

In your letter you call attention to the Council order passed on October 3, 1928, and appearing on page 3690 of the Journal, whereby the Commissioner of the Fire Department is authorized to pay to Kerr the difference between the salary that he would have been entitled to if on active duty and the pension which he drew during the period from January 1, 1926, to July 1, 1927.

You state that this is a very unusual order; that this employee did no work for the City during the period mentioned; that such payment would be a donation; and you ask whether the Comptroller can legally pay the amount so ordered to be paid.

We know of no theory under which such payment could lawfully be made. There is a section of the Chicago Municipal Code of 1922 (section 1199) which provides that any member of the Fire Department receiving an injury or becoming disabled while in the discharge of his duties so as to prevent him from attending to his duties shall, during the time that the disability lasts, but not

exceeding twelve months, receive his usual salary. You do not state whether Kerr was injured in the service or not, but for the purposes of this opinion it would make no difference. There would be an improper application of relief measures if a party thus injured were to be assisted from both the pension fund and the salary fund, and in any event the payment of his full salary under section 1199 could continue for only one year, while the order in question purports to authorize it for a year and a half.

The Firemen's Pension Act (section 9) contemplates a pension only in case of retirement because of disability. We must assume, therefore, that Kerr was disabled and was not employed by the City during the time mentioned. Consequently, you are correct when you say that the payment proposed would partake of the nature of a donation or gift. As such it would be unlawful.

Our Supreme Court only recently reiterated its oft expressed ruling that a municipal corporation has no right to give away public money.

“* * * A municipal corporation holds its property in trust for public uses, and its funds can be used only for corporate purposes. They cannot be diverted to private use. Nor can the municipal authorities or the electors give away the money or property of the municipality. * * * *Board of Education v. Alton Water Co.*, 314 Ill. 466.” ..

We are, therefore, constrained to advise you that the payment of money as proposed in the said order of the City Council would be contrary to law.

(No. 6317—November 2, 1928—J. R.)

CLAIMS AGAINST CITY, DEFECTIVE SIDEWALK.

One who claims damage or injury from a defect in a sidewalk must show due care and diligence on his part and also actual or constructive notice of the defect to the City authorities.

Hon. John S. Clark, Chairman, Committee on Finance:

You recently submitted to this office for an opinion the claim of Dr. Clarence J. Bertaut, 1860 West Madison street, for damage to his automobile on August 30, 1928, about 11:15 a. m., caused by loose iron binding on the curbing in front of 1859 West Madison street, piercing his automobile tire and tube.

The Acting Assistant Superintendent of Streets, Central Division, Mr. W. G. Conrath, in his report to this office on October 18, 1928, states that there was a loose iron band projecting from the sidewalk in front of 1859 West Madison street, which has since been removed.

In the case of *Brennan v. City of Streator*, 256 Ill. 468, the court said, on page 471:

“* * * A Municipal Corporation is not under the obligation to keep its streets absolutely safe for persons passing over any part of them. Its duty is only to exercise ordinary care to keep its streets and sidewalks reasonably safe for persons using them who are themselves exercising ordinary care. * * *”

Before the complainant can recover from the City, it must be shown that the City authorities had been notified of the condition of the sidewalk, or such a state of circumstances must be shown that notice would be implied. It is also evident that if Dr. Bertaut was diligent in his driving he would have noticed the loose iron projection

and avoided running into it since the incident as above stated occurred at about 11:15 a. m.

It is therefore our opinion that the City has a good defense, and the claim should be denied.

(No. 6318—November 5, 1928—L. H.)

LICENSES, BICYCLE RACE, FEES.

An application made to the City Collector for a license to conduct a bicycle race should be referred to the Athletic Commission for action and the license should be issued when approved by the Commissioner of Police at a license fee of 3 per cent of the gross receipts in accordance with sections 176, 181 and 196 of the Municipal Code; should the Athletic Commission refuse to act, the license may be issued by the City Collector without such action upon the approval of the application by the Mayor.

Hon. George K. Schmidt, City Comptroller:

You turned over to us a letter addressed to you written by the Chief Auditor, in which he states that application has been made to the City Collector for a license to conduct a six-day bicycle race, and that the City Collector is at a loss to know what kind of license is to be issued and has referred the promoter to the office of the Comptroller. From other parts of said letter and from conversations with you, we understand that there is now a great deal of doubt about the propriety of issuing a license, and that you would like to be advised in relation to the disposition to be made of the application.

We know of no reason why the application for a license should not be acted upon as required by the ordinances

of the City. There is no reason for refusing a license. In fact, the ordinances require that licenses of this kind should be issued in proper cases.

Section 176 of the Chicago Municipal Code of 1922 classifies amusements for which licenses are required into 22 different classes. Bicycle races come within the 21st class, which is defined as follows:

“All bicycle races, bowling matches and other athletic contests and exhibitions.”

By section 181 of the Code the license fee for amusements of the 21st class is fixed at three per cent of the gross receipts.

The ordinances require that the Athletic Commission should act in an advisory capacity in regard to such licenses. Section 193 states how this Commission is made up. That section, as amended, reads as follows:

“There is hereby created a commission to be known as the Athletic Commission of the City of Chicago, which shall consist of the Mayor, the Superintendent of Police and the members of the Committee on Public Recreation and Athletics of the City Council, who shall serve without compensation, and who shall not be entitled to receive any pay out of the City Treasury for expenses incurred in the performance of any duty as members of said commission.”

Among the duties which the Athletic Commission is to perform are the ones set forth in section 196, which reads as follows:

“In addition to the duties specified in the preceding section, the athletic commission shall act in an advisory capacity in all cases where licenses for bicycle races, bowling matches and other athletic contests and exhibitions are applied for. When such applications for licenses are made the city collector shall submit them to the athletic commission, and shall refuse to issue licenses for such bicycle races, bowling

matches and other athletic contests or exhibitions until the applications for such license have been approved by the superintendent of police after being advised thereon by the said athletic commission."

The proper course to pursue, therefore, is to refer the matter to the Athletic Commission, which is supposed to act on it. As this Commission is composed principally of legislative officers, however, it can act only in an advisory capacity—and this is what the ordinance contemplates. If the Athletic Commission does not act, it will be proper for the City Collector to issue the license in any event if the Mayor approves the application.

(No. 6319—November 14, 1928—L. H.)

WORKMEN'S COMPENSATION, PAYMENT.

Employees who have been awarded compensation for injuries are entitled to be paid at the same time that other employees receive their salaries according to the accompanying payrolls of the various departments involved.

Hon. George K. Schmidt, City Comptroller:

Our attention has been called to the fact that employees of the City who are receiving compensation for injuries under the Workmen's Compensation Act are not being paid at the same time that other employees receive their salaries, and that this situation causes complaint on their part and frequent applications to the City's Bureau of Workmen's Compensation and to the attorneys of the City who have the matter in charge. It is suggested by the latter that provision ought to be made to pay the com-

pensation vouchers at the same time as the payrolls for the departments in which they were employed at the time of their injuries are paid.

The suggestion seems to be in accord with the statute, which contemplates prompt payment when the liability is fixed. The matter is controlled by section 8 of the Workmen's Compensation Act, which reads in part as follows:

“All compensation provided for in paragraphs (b), (c), (d), (e) and (f) of this section, other than in case of pensions for life, shall be paid in installments at the same intervals at which the wages or earnings of the employee were paid at the time of the injury, or if this shall not be feasible, then the installments shall be paid weekly.”

Clearly it was the intention of the Legislature that the employee thus depending on the statutory compensation of from \$11 to \$19 per week should be paid with the same promptness that he would have been paid if he had not been injured and had remained in the service.

In addition to the above, the Act contains other provisions imposing attorneys' fees and costs in case the party has to bring suit for the purpose of collecting, and there is a fifty per cent penalty provided in case of vexatious or unreasonable delay. The law says:

“In any case where there has been any unreasonable or vexatious delay the payment or intentional under payment of compensation, or proceedings have been instituted or carried on by the one liable to pay the compensation, which do not present a real controversy, but are merely frivolous or for delay, then the commission may award compensation additional to that otherwise payable under this Act equal to fifty per centum of the amount payable at the time of such award.”

While it is doubtful whether the City can be held accountable under the provision just quoted, it is manifest that the law contemplates prompt payment, and the City is bound morally and legally to conform to this intention.

We therefore recommend that steps should be taken by which a workmen's compensation payroll may accompany the payroll of each department that is involved, and we submit this recommendation for your consideration.

(No. 6320—November 14, 1928—L. H.)

1 APPROPRIATIONS, APPROACHES TO BRIDGE.

An appropriation or bond issue for the construction of a bridge includes the work of paving temporary as well as permanent approaches to the bridge.

2 APPROPRIATIONS, LAPSE OF.

Appropriations or bond funds lapse at the end of the fiscal year unless they have been encumbered by contract duly entered into before that time.

3 WORDS AND PHRASES.

The word "bridge" includes the abutments and approaches that make the bridge accessible and convenient for public travel.

Hon. Richard W. Wolfe, Commissioner of Public Works:

Your letter concerning the appropriation for the paving of the approach to the 100th Street Bridge was referred to the writer for consideration and reply.

It appears from your letter that the original appropriations for the construction of the bridge over the Calumet River at 100th street were made in 1925. The ap-

appropriations were drawn from the East 100th Street Bridge Construction Bond Fund. The bonds were authorized by an ordinance passed on March 5, 1924, and afterwards approved by referendum. Council Journal, p. 1994.

The bridge was completed and opened to traffic in September, 1927, but the pavement of the approaches was of a temporary character, designed to remain in place under traffic only until the filling was sufficiently compact to warrant placing the permanent pavement there.

You state that it is now your desire to resurface the east approach to the bridge and to put the permanent pavement there as originally contemplated, and you ask whether it would be proper and legal to charge the expense of such resurfacing to the appropriation made for the construction of the bridge in 1925.

The question you now ask is somewhat different from the question you first asked, which was whether the unexpended balance in the bond fund was available for this purpose. We have no hesitation in saying that the bond fund may be drawn on to put in a permanent pavement to take the place of the temporary pavement, but it will be necessary to have an appropriation made by the Council before the work can proceed.

The ordinance authorizing the bonds states the purpose for which they are to be issued as "defraying the cost of constructing a bridge over the Calumet River at East 100th street," etc. (stating some other purposes for which the residue may be used). This general purpose clearly includes the work of paving the approaches. As was said by our Supreme Court in *City of Chicago v. P. F. W. & C. Ry. Co.*, 247 Ill. 319, "under the common law, and generally under the statutes in this country, a bridge

includes the abutments and such approaches as will make it accessible and convenient for public travel'' (p. 322). Hence, there was no doubt as to the propriety of using the proceeds of the said bonds for approaches to the bridge, and if it was deemed advisable to put in a temporary pavement which is now to be replaced, there cannot now be any question about replacing such temporary pavement with a permanent pavement and paying for same out of the bond fund.

The only question presented is the legality of paying at this time out of an appropriation made in 1925. The general rule with respect to appropriations is that they lapse at the end of the fiscal year unless they have been encumbered by contract duly entered into before that time. This is true of appropriations from bond funds as well as other appropriations. *People ex rel. Chadwick v. Sergel*, 269 Ill. 619.

We are therefore of the opinion that it will be necessary to secure authority from the City Council to make the expenditure for the pavement in question, but the Council has the right to appropriate money from the bond fund for this purpose. This can be done immediately after the first of January when an order of the City Council may be passed authorizing the expenditure, for which an appropriation may later be included in the Appropriation Bill of 1929.

(No. 6321—November 14, 1928—G. F. M.)

1 MUNICIPAL EMPLOYEES' PENSION, CHILD'S ANNUITY.

Minor children are entitled to the payment of an annuity where their parent had died while in municipal service from a cause other than injury incurred in the performance of an act of duty when such parent had been in the service at least four years from and after the date of his original entrance.

2 MUNICIPAL EMPLOYEES' PENSION, TERM OF SERVICE, LEAVE OF ABSENCE.

In computing the term of service rendered by a municipal employee any period of leave of absence without pay for not longer than 90 days must be counted as a period of service for annuity purposes.

Retirement Board, Municipal Employees' Annuity and Benefit Fund:

Replying to your request for an opinion as to the annuity rights of the minor children of James J. Dore, the following is submitted:

Your letter states that James J. Dore was a motor truck driver in the Department of Public Works, Bureau of Streets; that he was certified on June 22, 1925; laid off July 6, 1925; reinstated August 4, 1925; laid off September 18, 1925; reinstated June 8, 1926; leave of absence from September 1, 1926, to October 28, 1926; reinstated October 28, 1926; suspended February 4, 1927; reinstated March 16, 1927; leave of absence for two months from March 21, 1928; reinstated May 12, 1928, and died September 2, 1928.

Section 45 of the Municipal Employees' Annuity and Benefit Fund Act provides for the payment of a child's annuity to the minor children of certain classes of mu-

municipal employees, among which classes is that of a municipal employee who shall die while in the service from any cause other than injury incurred in the performance of an act or acts of duty, provided such municipal employee shall have been in the service at least four years from and after the date of his original entrance thereto.

Section 40 of the same Act provides as follows:

“For all purposes of this Act the following schedule shall be observed *in computing the term of service* of any municipal employee whose salary or wages shall be arranged on the basis stated, and any fractional part of a year of service rendered by any such Municipal Employee during any one calendar year, shall be determined according to such schedule:

“Annual or monthly basis service during four months in any one calendar year shall constitute a year of service.”

Section 51 of the same Act provides that in computing the term of service rendered by a municipal employee subsequent to the 31st day in the month of December, 1921, there shall be counted as periods of service for annuity purposes “any period of leave of absence without pay not longer than ninety days.”

It appears from the record of service submitted to me that James J. Dore rendered service in the year 1925 during the months of June, July, August and September; in 1926, during the months from January to August, inclusive, and was further entitled to credit for September and October while on leave of absence, said leave being less than ninety days; in 1927 during each one of the twelve months of the year; in 1928 during the months from January to the time of his death in September, including the period of his leave of absence from April 1st to May 12th, said period being less than ninety days.

James J. Dore having rendered service "during four months in any one calendar year" for the years 1925, 1926, 1927 and 1928, was at the time of his death entitled to service credit of four years pursuant to sections 40 and 51 of the Municipal Employees' Annuity and Benefit Fund Act.

I am of the opinion that the minor children of James J. Dore are entitled to the annuities provided for in section 45 of the Act.

(No. 6322—November 16, 1928—L. H.)

1 APPROPRIATIONS, PAYROLLS, TEMPORARY WORK.

Men who are on the payroll under one designation or classification may be assigned by the head of a department to perform work of a different but temporary and necessary nature in the same line of employment and be paid from the same payroll.

2 APPROPRIATIONS, TEMPORARY ASSIGNMENT OF DIFFERENT WORK IS NOT A DIVERSION OF.

The assignment of an employee to a different work in the same line of employment by the head of a department is not regarded as a diversion of an appropriation.

3 CIVIL SERVICE, CLASSIFICATION, DEPARTMENT HEADS' DUTY.

It is incumbent upon the head of a department to request the Civil Service Commission to make a classification that will provide work for one or more employees whenever such work warrants regular and permanent employment.

Hon. Richard W. Wolfe, Commissioner of Public Works:

There was submitted to us a controversy which has arisen by reason of the holding up of the pay of two

men employed in the Bureau of Streets in a different capacity than that for which the appropriation was made. On this we submit the following:

It appears that there are two men in the Bureau of Streets who are on the payroll under the title of "Asphalt Helper." The Comptroller, in his statement, says that both of these men are known in the department as "Inspector of Night Watchmen," also, that both of these men are charged to the Vehicle Tax Fund Account 281-A-4, in the appropriation for which there appears to be no authority for the employment of inspectors of night watchmen. The Comptroller therefore has held up the pay of these men and wants an opinion as to whether they can be paid for their services rendered in a different capacity than the appropriation calls for.

The Superintendent of Streets states that these men were employed as asphalt helpers but were temporarily detailed by him to check up the attendance of night watchmen. We have asked to be given full information in regard to the assignment of these men, and it appears that the detailing for this purpose was important in order to conserve the City's property.

The making of vehicle tax repairs requires that the equipment of the City should be distributed to a number of different places and frequently left there over night. When this happens watchmen are employed in two shifts, one working from 4 o'clock p. m. to 12 o'clock midnight, and the other from 12 o'clock midnight to 8 o'clock a. m. The nature of the duties of night watchmen are such that experience has shown that they often become careless and forsake the job to do errands of their own and leave the City's property unguarded. It is stated that it is essential to keep a check of some kind on these night watchmen, and that the simplest way of doing it is to assign some

person working in the Bureau to the task of making the rounds and reporting whether or not the night watchmen are attending to their duties. Such employment, however, is not continuous, and the men assigned to the work return to their regular duties as soon as it is feasible to take them off from the work of checking up on night watchmen.

The holding up of the pay of these men for the reasons given would involve a construction of the various laws relating to the status of civil service employees, and to the right of the head of a department to shift them under appropriations made by the City Council if such men were assigned permanently to different work than that for which they were employed, but the temporary assignment of men to do different work in the same line of employment can hardly be regarded as a shift of duties, or a diversion of an appropriation.

Therefore, if we regarded the assignments in question as permanent assignments we would be constrained to say that there is no authority for employing an asphalt helper as an inspector of night watchmen. In fact, a very technical construction of the law applicable to the situation might lead to the same conclusion. We are of the opinion, however, that to hold that a man cannot be temporarily assigned to duties in the same line of employment, but of a different character, in order to conserve the best interests of the City, would be unduly hampering the head of a department who is responsible not only for the conduct of the individual employees, but also for the ultimate results achieved in the department. If it is necessary to make the rounds in order to ascertain whether the night watchmen are guarding the City's property, and such work can be accomplished by the force employed and without applying for some workman who is especially desig-

nated permanently for that employment, the assignment is within the discretion of the head of the department.

Section 3 of the Civil Service Law requires the Civil Service Commissioners to classify all the offices and places of employment in the City, and when the classification is made the whole is regarded as the classified civil service of the City, to which no appointments can be made except according to the rules of the Civil Service Commission. Therefore, if you find it necessary to employ inspectors of night watchmen constantly, or to such an extent that that work can be regarded as the regular employment of some person assigned to it, it will be incumbent on you to ask the Civil Service Commission to make a classification that will provide for one or more employees of this character. We do not understand that you need such employees, and it is stated to us by the Superintendent of Streets that he takes care of this work through the method of selecting one or the other of the asphalt helpers from time to time, as occasion requires. Under these conditions the men thus employed who must do what they are told to do by the head of the department, are entitled to their pay, and their pay checks should be turned over to them for the time that they were employed.

(No. 6323—November 16, 1928—L. H.)

1 WATER METER, INSTALLATION, COST.

Water meters must be furnished and the cost of installing them must be borne by the institution or owner.

2 WORDS AND PHRASES.

The phrase "cost of installing" used in the Water Meter Ordinance includes the connections, vaults, etc., and the cost of the article itself.

3 WORDS AND PHRASES.

The word "furnish" used in section 4136 and omitted in section 4128 of the Municipal Code (Water Meter Ordinance) was merely to distinguish between the furnishing of the meter and its installation or to divide the expense of installation of additional meters.

Hon. Richard W. Wolfe, Commissioner of Public Works:

We are in receipt of your letter of October 11, 1928, followed and modified by your letter of October 22, 1928, relating to the interpretation to be given to a certain provision appearing in the universal water metering ordinance, in section 4128. That part of section 4128 which you ask us to construe reads as follows:

"The supply to all premises enumerated in this section on which water may be taken from the water-works system of the City of Chicago shall be controlled by meter, and the cost of installing the meter, connections, and vaults thereof, and the erection, construction and maintenance thereof shall be paid for and be borne by the institution or owner thereof."

You state in your letter that it is not clear to you whether the City or the exempted institution or owner is to furnish the meter. The only reason why this doubt is expressed seems to be because in section 4136 the ordinance uses the word "furnish" when it speaks of other

buildings where meters must be installed. Thus, section 4136 reads in part as follows:

“Except as hereinbefore provided in section 4128 of this Chapter, the City shall furnish, install and maintain at its own expense all water meters authorized and required hereunder, but where a meter is required to control additional service pipes for auxiliary or emergency water supply, or where such meter is installed on service pipes to which private supply pipes are connected, or where it is so provided in this Chapter, said meter shall be furnished by the owner or consumer, but it shall be installed and maintained by the City at the cost and expense of said owner or consumer.”

The fact that in section 4136 the wording is that the meter shall be “furnished” by the owner and “installed and maintained” by the City, causes you to seek advice on the meaning of the sentence quoted from section 4128 because the word “furnish” is not used there while “installing” and “maintenance” are used.

If the two passages quoted above were similar in their wording the omission of the word “furnish” from the first would be significant, but the two provisions are worded so differently that the meaning of each is to be gathered from the entire sentence and context in each case without reference to the other.

In section 4128 the ordinance provides for exempting certain classes of buildings from the payment of water rates—that is to say, property used for charitable, religious or educational purposes, etc. It then goes on to say that these buildings and institutions must be supplied through meters, and the cost of installing such meters, connections, and vaults containing them, and the construction, erection and maintenance must be borne by the institution or owner. There seems to be no room for doubt about the intention of the Council, since the word-

ing is comprehensive and makes no exception as to anything included in the cost. Webster's Dictionary defines "install" as "to set up or fix in position for use or service." The cost of installing necessarily includes the cost of the article to be installed. This is all the more manifest in the present instance when we consider that the words "cost of installing" apply not only to the meters themselves but also to the connections, vaults, etc., which are not independent articles and which could not in the nature of things be furnished by anyone except the one who installs the apparatus.

As we view it, the addition of the word "furnish" in section 4136 is due to the fact that the City Council there saw fit to divide the expense of the installation of an additional meter, and therefore it found it necessary to distinguish between the furnishing of the meter and its installation.

We are therefore of the opinion that the exempted buildings and institutions mentioned in section 4128 are required to furnish their own meters.

(No. 6324—November 19, 1928—L. H.)

1 INSPECTION, SCALES OF RAILROADS.

The City has power to inspect scales owned and operated by railroad companies and to charge a fee therefor notwithstanding section 54 of the Illinois Commerce Commission Act.

2 CITY INSPECTOR, POWER, RAILROAD SCALES

The City inspector of weights and measures has power and authority to test and make inspection of all weights, measures and measuring devices wherever found, regardless of their ownership.

3 WEIGHTS AND MEASURES ACT.

The right to inspect scales owned and operated by railroads is not taken away by section 54 of the Illinois Commerce Act and transferred to the Illinois Commerce Commission, the latter Act being prior in time of passage.

4 ILLINOIS COMMERCE ACT.

Section 54 of the Illinois Commerce Act in no way affects or repeals the City's power to provide for the inspection of scales owned and operated by the railroads.

Hon. Daniel A. Serritella, Inspector of Weights and Measures:

We have before us your letters concerning the attitude of the various railroad companies with respect to the right of the City to inspect their scales, to which is attached copies of correspondence relating thereto. You ask for an opinion as to your powers and duties in the matter.

It appears that there is a more or less concerted movement on the part of the railroads to contest the right of the Inspector of Weights and Measures to inspect their scales and to charge the inspection fees for doing so, as provided by ordinance. At first this objection partook of the nature of a protest because it was contended that

the scales in question were "used for company business only," and that the public had no interest in the accuracy of the scales. But, after some correspondence and further demands, it would seem that the Law Department of at least one of the roads has shifted its position, and now claims that under section 54 of the Illinois Commerce Commission Act all authority over the scales of the railroads is lodged in the Illinois Commerce Commission. In support of its position the cases of *Village of Atwood v. C. I. & W. R. Co.*, 316 Ill. 425, and *City of Witt v. C. C. C. & St. L. Ry. Co.*, 324 Ill. 494, are cited. It is also stated that by necessary implication any authority which the City may have had by virtue of the Cities and Villages Act has been repealed by the enactment of the Commerce Act.

The two cases relied upon by the lawyers of the railroad company relate to the regulation of the speed and operation of the railroads, and have nothing whatever to do with the provisions of section 54 of the Commerce Act, which, in so far as it is material here, reads as follows:

"The Commission shall have power to ascertain, determine and fix for each kind of public utility suitable and convenient standard commercial units for the purpose of this Act; * * * to ascertain, determine and fix adequate and serviceable standards for the measurements of quantity, quality, * * * or other condition pertaining to the performance of its services or the furnishing of its product or commodity by any public utility."

The contention that this provision in the Commerce Act repeals the provisions of the Cities and Villages Act giving the City power to inspect weights and measures is completely answered by the fact that the City's rights and powers in this respect were re-enacted and confirmed by the Weights and Measures Act of 1921 which was

passed after the Commerce Act was enacted. But, aside from the fact that the Weights and Measures Act outranks the other in point of time, there never was any reason for assuming that the power to regulate the rates and operation of a public utility had the effect of absolving such a utility from the responsibility of observing the law of the municipality in other respects. It would be as reasonable to say that by reason of the enactment of the Commerce Act such a public utility is not liable to the law of negligence. The provision for inspection and sealing of weights and measures applies to all, and a railroad company will not be held to be exempt merely because the authority to regulate rates, grade crossings and the operation of the road is placed in the Illinois Commerce Commission.

Taking up now the question of whether the claim that the use of such scales is "for company business only" is based on sound reasoning, we find that the City's rights and powers under the two statutes are in force and applicable to the situation. Under the Cities and Villages Act the City has the following powers:

"Fifty-fourth—To regulate the inspection, weighing and measuring of brick, lumber, firewood, coal, hay, and any article of merchandise.

"Fifty-fifth—To provide for the inspection and sealing of weights and measures.

"Fifty-sixth—To enforce the keeping and use of proper weights and measures by vendors."

The City's powers under these clauses have been upheld in recent years, and after the enactment of the Illinois Commerce Act. *City of Chicago v. Wisconsin Lime & Cement Co.*, 312 Ill. 520; *City of Chicago v. Kantz*, 313 Ill. 196.

“Under the general powers given to cities ‘to regulate the inspection, weighing and measuring of brick, lumber, firewood, coal, hay, and any article of merchandise,’ the City has the authority to test private scales, to maintain public scales, and to appoint a public weighmaster to have charge of the scales and to do the weighing.” *City of Chicago v. Kantz*, 313 Ill. 196-202.

Aside from the powers granted under the Cities and Villages Act, the City Inspector of Weights and Measures is given all the powers within the City over the weights and measures that are given to the State Director of Trade and Commerce in other parts of the State. (See section 14 of the Weights and Measures Act.) By virtue of that provision the City inspector has authority and power to inspect and test all weights, measures and weighing and measuring devices wherever he may find them, and regardless of whether such devices are public or private. See sections 5 and 7.

The ordinances of the City require that every person using scales in weighing “any article weighed for shipping or receiving purposes” to cause the same to be inspected and sealed by the Inspector of Weights and Measures. (Section 4179 of the Chicago Municipal Code of 1922.) It will thus be seen that the duty to inspect is mandatory. Such provision in the ordinance is clearly within the powers granted to the City, and was so held in the recent case of *City of Chicago v. Wisconsin Lime & Cement Co.*, 312 Ill. 520.

We are therefore of the opinion that you are acting within your powers, and it is your duty to make inspections of scales used by the railroads.

(No. 6325—November 21, 1928—L. H.)

1 GRAVITY WARM AIR HEATING PLANTS, REGISTRATION FEE, PAYMENT.

The registration fee required from contractors engaged in the business of installing gravity warm air heating plants is a license fee and is payable in the same way as license fees.

2 LICENSE, PAYMENT.

Unless expressly otherwise provided for, a license fee, under section 2426 of the Municipal Code of 1922 is payable in all cases for a full year where the business was operated the year before or application for license is made in the first part of a year; a license fee is only for such period as will lapse at the end of the year where a new business is started and an affidavit is furnished by applicant showing that he is liable only to a portion of the year.

3 MUNICIPAL CODE OF 1922.

Section 2426 of the Municipal Code of 1922 applies to those engaged in installing gravity warm air heating plants.

Hon. Christian P. Paschen, Commissioner of Buildings:

We are in receipt of your letter of recent date concerning the prorating of fees required for registration certificates for contractors engaged in the business of installing gravity warm air heating plants. You state that the business of installing these plants is now at its seasonal peak; that a number of small contractors who have not been bonded, as required by the ordinance, during the summer months, have now appeared and they protest the payment of the full fee of \$50 as unfair and unreasonable because their registration will expire on December 31st. These contractors have asked that they be granted the privilege of having the registration reduced and prorated according to the number of months they have been engaged in the business of installing. You ask to be advised whether it would be legal for you to prorate the fee.

While the ordinance in question does not call this registration fee a license fee, nevertheless, it stands on the same footing as a license fee, and would probably be so construed in case it would be passed on by a court. We therefore turn to the provision (section 2426) in the Chicago Municipal Code of 1922 which provides for the pro-rating of licenses. That section reads as follows:

“No license shall be granted for a longer period than one year, except where otherwise specifically provided, and every license shall expire on the 31st day of December following the date of its issuance, except when otherwise specifically provided. No license shall be issued for any period of time less than a year or for a less sum than the full annual license fee, except when otherwise by ordinance specifically provided. All licenses for new places of business, the annual fee for which is fifty dollars or more, unless otherwise specifically provided, shall be pro-rated quarterly, and where the annual fee is less than fifty dollars, shall be pro-rated semi-annually; provided, however, that in all cases of pro-rating the applicant shall first furnish an affidavit in form satisfactory to the city collector that the said applicant was not liable for a license prior to the period for which said license is applied for. The licenses for auctioneers, pawnbrokers or brokers of any class whatsoever shall not be pro-rated. The fee for each license issued shall be collected at the time of the issuance and delivery thereof.”

At first blush there seems to be an inconsistency in the above. That is to say, the provision that no license should be issued for less than the full annual license fee seems to be in conflict with the requirement that licenses for new places of business shall be prorated so that only a part of a year's fee is required if an affidavit is made showing that the party is not liable for a license fee before the time at which he applies for a license. But, on further consideration, and construing the two sentences, together, we are of the opinion that the intention of the

City Council can be ascertained. It would seem that the intention was to make the license fee in all cases (except where specifically provided otherwise) for a full year in case a business was operating the year before, or in case the license was applied for in the first period of the year; but where a new business is started, the license fee is to be only for such period as would elapse to the end of the year. Applied to the ordinance in question, a new contractor, seeking registration, would be required to pay for the last quarter, or the last half of the year, or the last three-quarters of the year, according to the time when he began operating his business.

The ordinance which we are called upon to interpret was passed on December 28, 1927. (Council Journal, pp. 1662-1668.) It says that the certificate issued thereunder to a contractor expires on December 31st of the year in which it is issued, but there is no such thing as a specific provision for issuing the license for a period less than a year, or for less than the full annual license fee. Hence, under the construction we give the provisions of the Code above quoted, you would be authorized to prorate a license fee for a new place of business in accordance with section 2426, unless there was some specific provision in the warm air heating ordinance that prohibited it. Since there does not appear to be such a provision, the fees for new applicants shall be prorated.

In our opinion, therefore, you will be justified in prorating the registration fees prescribed in the ordinance of December 28, 1927, provided the parties furnish you with an affidavit showing that the applicant was not liable for a license prior to the present quarter of the year, or half of the year, as the case may be, for which applicant asks a prorating.

(No. 6326—November 27, 1928—F. J. V.)

BILLIARD SKILL NON-GAMBLING DEVICE.

The device called "The Billiard Skill," which consists of a miniature billiard and pool table with a pistol protruded over the table at one end thereof, intended to provide merely a test of skill is not a gambling device within the meaning of Illinois statutes and ordinances of the City of Chicago; but such a device is subject to police regulation if offered to the public for gain or hire the same as billiard and pool tables.

Hon. William F. Russell, Commissioner of Police:

We have your recent request for an opinion as to whether a certain implement constitutes a gambling device. The subject-matter of your request is best presented by quoting your letter, which is as follows:

"I am transmitting herewith a photograph of a device described as 'The Billiard Skill,' which is now being distributed in this City.

"The question as to whether or not the operation of devices of that nature constituted gambling has been taken up with your Department on previous occasions. Under date of December 3, 1924, your predecessor furnished the Police Department with an opinion to the effect that this was not a gambling device.

"The device mentioned in the first paragraph of my letter is now in the possession of the Police Custodian, floor 3½, City Hall, and I would ask that you kindly have one of your assistants make a visual inspection of the same for the purpose of determining whether or not it is a gambling device and that you furnish me with an opinion accordingly."

The opinion called for depends upon the law on the subject of gambling and gaming devices as declared by the State statutes and City Ordinances.

Gambling as defined by the statute (par. 298, chap. 38, Cahill's Stat., 1927, p. 901) consists in playing for money, or other valuable thing, at any game with cards, dice, checks, or at billiards, or with any other article, instrument or thing whatsoever, which may be used for the purpose of playing or betting upon, or winning or losing money, or any other thing or article of value. The City Ordinance (sec. 1567, chap. XXXIII, Municipal Code of 1922, p. 475) defines gambling in substantially the same language.

Section 1569 of said chapter of the City Code on the subject of gambling device reads as follows:

"No person shall bring into the City or have in his possession within the City, for the purpose of gaming or gambling for money or other valuable thing, any table, wheel or other device of any kind or character whatsoever on or with which money or any other valuable thing may in any manner be played or gambled for."

The first question to be decided is whether or not the implement in question is defined by statute or ordinance as a gambling device. On this subject we quote here the statute in force July 11, 1919, on the subject of "slot machines and other gambling devices," viz.:

"That it shall be unlawful for any person, firm or corporation, as owner, agent or otherwise, to manufacture, sell, lease, or hold, or offer for sale, or lease to another any clock, joker, punch board, tape or slot machine, or any other device upon which money is staked or hazarded, or into which money is paid or played upon chance, or upon the result of the action of which money or valuable thing is staked, bet, hazarded, won or lost, in any county in the State of Illinois in which there is a United States military post, or United States naval training station of the first class."

The device which is described as "The Billiard Skill" is not specifically included in this or any other statute or in any ordinance of the City. To constitute a gambling device within the meaning of the foregoing statute it must be a *device upon which money is staked or hazarded, or into which money is paid or played upon chance or upon the result of the action of which money or valuable thing is staked, bet, hazarded, won or lost.*"

We have carefully examined and inspected both the photograph and the original of device called The Billiard Skill. A description thereof being necessary here, we would describe it as a miniature billiard and pool table with a pistol protruding over the table at one end thereof. This device, in our opinion, is an innocent and legitimate test of the skill of the operator in both pistol firing and billiard and pool playing. There is nothing about the character of this device which could be said to bring it within the language above italicized and intended to describe what is in itself a gambling device. The Billiard Skill is intended to and does provide merely a test of skill and offers no elements of chance whatever in its use and operation. It is, therefore, like the billiard and pool table or shooting gallery, and is not of such character as to constitute a gambling device.

Like any other innocent implement or device calculated as a test for skill and amusement, it might be put to improper use, but such use, even if it constitute gambling does not constitute such implement a gambling device. This device may be subjected to police power regulation, as are billiard and pool tables, if offered to the public for gain or hire.

(No. 6327—November 28, 1928—L. H.)

ATTORNEY'S LIEN, NOTICE, DISPOSITION.

No other attention need be given a notice of an attorney's lien properly served upon the Comptroller than to await final disposition of the matter by the court.

Hon. George K. Schmidt, City Comptroller:

You forwarded to this office a notice of attorney's lien, claimed by Robert L. Floyd, in the matter of a proposed suit against the City on behalf of Frank Burg. You ask us to take such steps as will protect the City's interests.

The filing of this notice is the usual procedure on the part of an attorney who wishes to protect his fee. The City is bound to take notice of his claim. You undoubtedly have many of these notices now on file in your department, and are fully informed as to what to do in order to avoid liability on the part of the City. But, in order that you may have the statute before you and be fully advised with respect to the obligation of the City in the premises, we quote it in full. It is as follows:

“That attorneys at law shall have a lien upon all claims, demands and causes of action, including all claims for unliquidated damages, which may be placed in their hands by their clients for suit or collection, or upon which suit or action has been instituted, for the amount of any fee which may have been agreed upon by and between such attorneys and their clients, or, in the absence of such agreement, for a reasonable fee, for the services of such attorneys rendered or to be rendered for their clients on account of such suits, claims, demands or causes of action. Provided, however, such attorneys shall serve notice in writing, which service may be made by registered mail, upon the party against whom their clients may have such suits, claims or causes of action, claiming such lien and stating therein the interest they have in such

suits, claims, demands or causes of action, and such lien shall attach to any verdict, judgment or decree entered and to any money or property which may be recovered, on account of such suits, claims, demands or causes of action, from and after the time of service of the aforesaid notice. On petition filed by such attorneys or their clients any court of competent jurisdiction shall, on not less than five days' notice to the adverse party, adjudicate the rights of the parties and enforce such lien in term time or vacation." Par. 14, chap. 13, Smith's Stat., 1929.

You need do no more at present than file the notice of lien. In case the claim of Frank Burg should mature into a judgment the City may be called upon to pay such portion of the judgment as is protected by the lien to the attorney.

(No. 6328—November 28, 1928—L. H.)

METER VAULTS, REPAIR AT CITY'S EXPENSE.

Broken meter vaults located in streets, alleys, sidewalks and parkways outside of lot lines must be repaired by the City at its own expense, unless it can be shown that the breakage was caused by the owner's negligence.

Hon. Richard W. Wolfe, Commissioner of Public Works:

Some time ago you informed us by letter that, owing to breakage, a number of meter vaults located in streets, alleys, sidewalks and parkways, outside of lot lines, have been broken, that these broken meter vaults are liable to cause injury to pedestrians and to vehicle traffic, and that you wish to be advised whether under the new meter ordinance, the repairs should be made by the property owner or by the City of Chicago.

Such repairs, unless it can be shown that the same was caused through the fault or negligence of the owner, must be made by the City at its own expense.

Section 4136 of the Chicago Municipal Code of 1922, as amended by the new meter ordinance, specifies the buildings and other places where water meters are required, states that the Commissioner of Public Works shall proceed to install them, and then provides as follows:

“All said meters shall be furnished and installed by and at the expense of the City of Chicago, provided, however, that in all new buildings where a meter is installed the owner shall install with his inside plumbing a connection to be furnished by said city.”

This in itself would seem to carry with it the cost of maintenance of meter vaults located on public property as well as of installation, but any doubt remaining is overcome by the following provision contained in section 4139:

“Except on service pipes supplying private fire protection systems, all boxes or vaults in which meters are to be placed shall be made in accordance with specifications to be prescribed by the commissioner of public works, and shall be located in accordance with the provisions of this section or as said commissioner shall direct, the cost of installing and maintaining such meter vaults or meter boxes to be paid by the City of Chicago out of its water fund or water revenues.”

It will thus be seen that the cost of installing and of maintenance is on the City. This is especially true with reference to meter vaults located outside of the lot line on public property. Where they are located within the lot line the matter may be subject to investigation in order to ascertain whether the owner is responsible for the broken condition. If in the street, sidewalk or parkway there can be no responsibility on the part of the owner of the adjoining premises unless he can be shown to have wilfully or carelessly caused the damage.

(No. 6329—December 1, 1928—L. H.)

1 SCHOOL TAX ANTICIPATION WARRANTS, PURCHASE OF.

Funds in the treasury which are not immediately necessary for the purpose for which they were accumulated may be used for the purchase of school educational tax warrants to an amount that will actually be collected from the school levy if authority to do so is given by ordinance.

2 TAX ANTICIPATION WARRANTS, ISSUANCE.

The levy of the City Council for the current year and not the amount extended by the County Clerk of the preceding year determines the amount or percentage of tax anticipation warrants which may be issued and sold.

3 TAX ANTICIPATION WARRANTS, NATURE.

Tax anticipation warrants stand on the same plane with bonds in so far as liability of the municipality issuing them is concerned.

4 MUNICIPAL CORPORATIONS, LOAN OF MONEY TO, LIABILITY.

Money loaned to a municipality creates a liability regardless of the validity or invalidity of the security taken therefor.

5 SURPLUS FUNDS STATUTE, SCHOOL TAX ANTICIPATION WARRANTS.

Although school tax anticipation warrants are not mentioned in the Surplus Funds Statute, the Act is broad enough to include them as "taxes levied by the City."

6 BOARD OF EDUCATION, ACTION BY CITY.

The City of Chicago may sue the Board of Education as the latter is a separate municipal corporation.

7 WORDS AND PHRASES.

The phrase "taxes levied by said City" in the Surplus Funds Act, includes anticipation warrants issued against school taxes.

8 WORDS AND PHRASES.

A "levy of a tax" is the order of the taxing authority to the effect that a tax shall be levied and collected.

Hon. George K. Schmidt, City Comptroller:

We are in receipt of your letter of November 30, 1928, to which you attached a copy of a proposed ordinance authorizing the Treasurer to purchase certain tax warrants drawn in anticipation of the School Educational Tax for 1928. You ask us to examine into the different phases of the proposed ordinance and let you know our opinion as to its legality.

The said ordinance recites that the Tax Levy Ordinance of the City of Chicago for the current year provides for a tax levy for the Board of Education of the City of Chicago for educational purposes in the amount of \$57,600,000; that the City Council, on January 28, 1928, by ordinance, authorized the issuance of tax warrants in anticipation of the taxes thus levied to the extent of 75 per cent of said levy; that such warrants were issued and sold up to \$30,600,000, of which some were purchased by the City Treasurer and City Comptroller with funds of the City that were not immediately necessary for the purposes for which they were accumulated.

The proposed ordinance then goes on to say that the Board of Education is unable to make payment of the school teachers' salaries and other necessary expenses for the balance of the current fiscal year, and therefore makes the request that additional warrants against said tax levy may be purchased out of such funds of the City; that to this end the Mayor and Comptroller are authorized by the proposed ordinance to issue additional warrants against said taxes to the extent of \$12,600,000; and that the Treasurer is authorized and directed to purchase such

additional warrants to the extent of \$12,600,000 with funds in his custody which are not immediately necessary for the purposes for which they are held, provided that the Board of Education shall first deliver to the City Treasurer an agreement in writing by the terms of which the said Board of Education shall obligate itself to deliver to the City Treasurer, at his demand, when they may be legally issued, tax warrants issued against and in anticipation of the school educational tax to be levied by the City Council of the City of Chicago for the year 1929, in exchange for and in lieu of the warrants of the year 1928 purchased under the terms of the said proposed ordinance.

As we understand your inquiry, you would like to have our opinion on the following points:

1. Can additional warrants against the 1928 School Educational Taxes be lawfully issued at this time?
2. To what extent can the Treasurer lawfully purchase such additional warrants?
3. What action of the City Council is required in order to enable the City Treasurer to make the purchase desired?
4. Will the City be protected against loss in case the tax levy is not sufficient to pay for the tax anticipation warrants to be purchased by the Treasurer?

Taking up these questions in the order in which they are stated above, we beg to advise you that the Mayor and the Comptroller may at the present time, without further action on the part of either the School Board or the City Council, issue such additional tax anticipation warrants.

The City Council, on January 28, 1928 (Council Journal, pp. 2047-48), passed an ordinance, at the request of

the Board of Education, authorizing the Mayor and Comptroller "to issue warrants against and in anticipation of the educational tax levied by the City Council * * * to the extent of seventy-five per centum of the total amount of said educational tax levy." Inasmuch as the levy was for \$57,600,000, the power thus given to the Mayor and Comptroller will not be exhausted until there have been issued \$43,200,000 of such tax warrants.

The only reason the question on this point has arisen is because there persists an impression, among many who have to do with the financing of public corporations, that the statutory authority for issuing and selling tax anticipation warrants is limited to 75 per cent of the taxes extended by the County Clerk for the preceding year instead of by the levy of the taxing authority for the current year. The question has arisen a number of times with respect to the warrants of the City, but this department has uniformly and consistently held that the percentage is to be applied to the levy of the City Council for the current year and not to the amount extended by the County Clerk for the preceding year. We refer you to the following opinions written on the subject which are accessible to you: Opinion dated September 1, 1914, and appearing in Opinions of the Corporation Counsel and Assistants from January 1, 1913, to October 5, 1914, at page 1035; Opinion dated August 5, 1915, and appearing in the volume covering period from May 1, 1915, to June 30, 1916, at page 196; Opinion dated August 17, 1916, and appearing in the volume covering period from July 1, 1916, to December 31, 1919, at page 53; Opinion dated March 27, 1917, and appearing in the last mentioned volume at page 259.

The statutory authority for the issuance of City warrants is contained in section 2 of the Act of June 27, 1913 (Cahill's 1927 Statutes, p. 2494), which reads as follows:

“That whenever there is not sufficient money in the treasury of any county, city, town, village or other municipal corporation to meet and defray the ordinary and necessary expenses thereof, including all expenses for building purposes, it shall be lawful for the proper authorities thereof to provide a fund to meet all said expenses by issuing and disposing of warrants drawn against and in anticipation of any taxes already levied by said authorities for the payment of all such ordinary and necessary expenses of such county, city, town, village or other municipal corporation, to the extent of seventy-five per centum of the total amount of any such tax levied; *Provided, however,* that warrants drawn and issued under the provisions of this section shall show upon their face that they are payable solely from said taxes when collected and not otherwise, and shall be received by any collector of taxes in payment of the taxes against which they are issued, and which taxes against which said warrants are drawn, shall be set apart and held for their payment.”

The words “seventy-five per centum of the total amount of any such tax levied,” as used in the above excerpt, can only mean (in the case of the City) 75 per cent of the tax levied by the City Council. The “taxes already levied by said authorities” can mean nothing else. It cannot have reference to the amount that will actually be extended on the books of the Collector by the County Clerk, because the purpose of the act is to enable the municipalities to raise money on these warrants long before the tax is extended by the County Clerk, and therefore no one can determine the amount so to be extended at the time the municipality is supposed to issue the warrants. Neither can it be assumed that the words have any reference to the amount extended by the County Clerk in the preceding year, because the Legislature would undoubtedly have said so if that was the intention. In fixing the debt limitation of the City, the Legislature said that the City “shall not become indebted in the aggregate to exceed five per

centum on the value of the taxable property therein, to be ascertained by the last assessment for the State and County taxes previous to the incurring of such indebtedness." (Cities and Villages Act, art. V, sec. 1, cl. 5.) If that was to be the determining factor in fixing the amount of tax warrants to be issued, the Legislature would have said "seventy-five per centum of the total amount of the taxes extended for such taxing authorities in the year previous to the issuing of such warrants," or other words to that effect.

The rule of construction in such cases is that the words used must be interpreted according to their usual and ordinary meaning. The "levy" of a tax is the order of the taxing authority to the effect that a tax shall be levied and collected. Not only is that the accepted meaning of the word, but we have numerous court decisions directly holding that such is the meaning as used in this statute, although it is true that the word "levy" is frequently used in more than one sense.

Thus, it was held, in *Southern Ry. Co. v. Kay*, 39 S. E. 785 (62 S. C. 28), that "a tax is said to be levied when the amount or rate to be imposed is fixed by law, for what is wanting to complete such levy is supplied by the standing tax laws, and consists of a course of administrative action."

"We think a fair construction of the language, 'whenever the corporate authorities of any city, town or village have heretofore levied or shall hereafter levy any special assessment,' was intended by the legislature to mean merely that whenever the corporate authorities have heretofore determined or shall hereafter determine to levy any special assessment, then they may provide, by ordinance, for a division of the assessment into installments." *Walker v. People*, 170 Ill. 410-415.

In the case of *Pettibone v. West Chicago Park Comms.*, 215 Ill. 304, it was held that the word "levy," as distinguished from the constitutional provision requiring the municipality to provide for the collection of a direct annual tax sufficient to pay the principal and interest on bonds, means that the rate of per cent of the assessed value should be fixed annually by the taxing authority.

In the case of *Gray v. Board of School Inspectors*, 231 Ill. 63, 70, where the question was whether the School Board or the City of Peoria "levied" the taxes, the court said:

"By the special charter of the City of Peoria, the board of school inspectors appoints a treasurer, who is to receive all moneys under the control of said board and keep a true and accurate account of the same, paying out such money only upon the order of said board. (Private Laws of 1869, pp. 169, 170.) The said board determines the amount of money required to be raised by taxation for the support of the schools, notifies the city council of such amount and the rate to be levied, and the city council is then required to levy and collect such amount with other city taxes. No discretion is given to the city council as to the amount to be levied,—when it is fixed by the school board the council must levy that sum. Unless the word 'levy' is given a very narrow meaning, then under said section 2 of said chapter 146a said appellee board is a school authority authorized to issue the warrants in question. As applied to taxation this word is given a variety of meanings, among others the following: 'To impose or assess'; 'to impose, assess and collect under the authority of law'; 'to raise or collect by assessment'; 'to charge a sum of money already ascertained against a person or property subject to the charge'; 'to determine by vote the amount of tax to be raised'; 'to fix the rate by which property is to be taxed.' (25 Cyc., p. 207, and authorities there cited.) Under some of these definitions, obviously the appellee board is the authority which 'levies' the tax for school purposes. Under the city charter this board possesses practically

all the powers that any school board of a city or country district possesses. True, it certifies the rate to the city council, and the charter says that body must levy; but the ordinary school district returns its levy to the township treasurer and he gives it to the county clerk."

Thus, it will be seen that our Supreme Court has given direct sanction to the definition appearing in 25 Cyc. 207, which is given as "to determine by vote the amount of tax to be raised" and "to fix the rate at which property is to be taxed," and therefore it is plain that the meaning of the statute above quoted is that after the City Council has made the levy by passing the annual Tax Levy Ordinance anticipation warrants against such levy may be issued to the extent of 75 per cent thereof.

While the authority to issue such warrants in the case of the School Board is contained in another statute, this does not change the situation with respect to the matter under consideration. The provision of the School Act defining the Board's powers with reference thereto reads as follows:

"* * * and when there is not sufficient money in the treasury to meet the ordinary and necessary expenses for educational and for building purposes, to request the city council, whose duty thereupon it shall be, to order issued warrants against and in anticipation of any taxes levied for the payment of the expenditures for educational and for building purposes to the extent of seventy-five per cent of the total amount of the taxes levied for such purposes: provided, however, that warrants drawn and issued under the provisions of this section shall show upon their face that they are payable solely from said taxes when collected, and not otherwise, and shall be received by any collector of taxes in payment of taxes against which they are issued, and such taxes (against) which said warrants are drawn shall be set apart and held for their payment. Every warrant issued against such taxes shall bear interest, payable

annually out of the taxes against which said warrants are drawn, at a rate of not to exceed five per cent per annum, from the date of their issuance until paid, or until notice shall be given by publication in a newspaper or otherwise that the money for the payment of said warrants is available and that said warrants will be paid on presentation." Section 132 of School Act, Cahill's Statutes, 1927, p. 2279.

By the provisions of the statute just quoted the duty of the City Council with respect to school warrants is purely ministerial, and it takes no responsibility from the School Board's shoulders. The Council has already acted in this regard, and has given the necessary authority to the Mayor and Comptroller to issue the additional warrants by its ordinance of January 28, 1928.

There being authority to issue the warrants, the next question that presents itself is the question of how far the City Treasurer may lawfully go in purchasing such additional warrants out of surplus funds at his disposal in case the City Council gives him authority to make such purchases.

The Act under which such purchases may be authorized reads as follows:

"That every city, incorporated town or village, now or hereafter holding in its treasury any fund set aside for use for some particular purpose, that is not immediately necessary for such purpose, may by ordinance of the city council of such city or board of trustees of such town or village, use the money in such **fund in the purchase** of tax anticipation warrants issued by said city, town or village against taxes levied by said city, town or village; such warrants to bear interest not to exceed four per cent per annum, and all interest upon such warrants, and all moneys paid in redemption of said warrants shall at once be credited to and placed in such fund so held by such city, town or village; * * *." Cahill's Statutes, 1927, p. 522.

While this statute does not specifically include anticipation warrants issued against school taxes, nevertheless the Act is broad enough to include them because the school tax is a "tax levied by said City." Therefore, by the passage of a proper ordinance, the funds in the treasury not immediately necessary for the purpose for which they were accumulated may be used for the purchase of school educational tax warrants to the same extent as in the purchase of the City's tax warrants. The obvious answer to the question, therefore, is that the Treasurer may lawfully purchase to the extent of the full \$12,600,000 upon being given proper authority by the Council. This is subject to this one limitation, however: If the amount so purchased exceeds the amount that will actually be collected from the levy there will be no means of paying the excess, since the warrants can be paid only out of the taxes against which they are drawn. If there is a shortage the debt can only be extinguished by securing a judgment against the Board of Education unless the Legislature makes other provision for paying the indebtedness. Hence, it would not be advisable to purchase more of these warrants than there is reasonable expectation of realizing out of the tax levy. The amount of taxes extended by the County Clerk for school educational purposes for the year 1927 was \$41,079,334.20. It will be for the City Treasurer and the City Comptroller to determine from that figure how far the City may safely go in purchasing such warrants for the year 1928. This opinion has to do only with what is lawful as distinguished from what may be regarded as good financing.

The third question is as to what action of the City Council is necessary in order to enable the Treasurer to make the purchases desired. This has already been answered by what we have said.

The general ordinances of the City provide a way and authority to proceed in the case of the City's own tax anticipation warrants, so that it is not necessary to pass additional ordinances except under extraordinary circumstances. When school warrants are to be purchased it is necessary to pass an ordinance each time, since the general ordinances do not authorize the purchase of school warrants.

It is therefore essential that an ordinance be passed authorizing and directing the Treasurer to purchase the warrants. For your convenience we have prepared a draft of such an ordinance authorizing the purchase of \$6,000,000 of such warrants out of funds on hand in the Traction Fund and certain other funds specifically named. If this does not meet the requirements or the views of the Council, the amount may be changed and other funds may be designated in place of the ones we named, but the form should be practically as indicated by us. We feel that the tentative ordinance submitted by you is not specific enough to meet the requirements of the situation, and on the other hand, it again authorizes the issuance of warrants which have already been authorized.

The only other question involved is whether the City will be protected against loss if it purchases warrants in excess of the amount that will be collected from the tax levy.

The authorities are all agreed that when a municipal corporation obtains money from a creditor and uses it for corporate purposes the creditor can recover even if the securities issued to him are invalid. This situation sometimes arises in the case of void bonds. A leading text writer states the law in such cases as follows:

“If a municipal corporation sells and disposes of negotiable instruments purporting to be bonds, the

transaction is a loan to the municipality. The municipality is in the market as a borrower and receives the money in that character, notwithstanding the transaction assumes the form of a sale of its securities. If it has power to borrow money or to incur debt for the purposes for which the bonds are issued, and the ground of invalidity urged against the bonds is that the city had no power to issue bonds which are negotiable in form, or that it had not authority to make bonds payable in the form and manner adopted, the transaction resulting in the transfer of the consideration for the issue *justifies a recovery* against the municipality *as for money of the plaintiff* had and received by it. The principle upon which a recovery has been sustained under such circumstances is the broad obligation to do justice which rests upon all persons, natural and artificial; in consequence of which it has been declared that if a municipality obtains the money or property of others without authority, the law, independently of any statute, will compel restitution or compensation. The action is justified under the forms of the common law on the ground that it is an action for money of the plaintiff had and received by the municipality, being money paid by mistake, or upon a consideration which happens to fail, or money got through imposition." Dillon on Municipal Corporations, 5th ed., sec. 961.

The same rule applies in the case of tax anticipation warrants as in the case of bonds. They are merely a different form of written obligation but governed by the same rules. It has been held on the highest authority that in a case of the kind suggested the Legislature could compel the municipality to levy a tax to pay the debt.

Thus, it was held, in an opinion by Justice Field, in *New Orleans v. Clark*, 95 U. S. 644, that "the power of the Legislature to require the payment of a claim for which an equivalent has been received, and from the payment of which the City can only escape on technical grounds, would seem to be clear."

The right of the City to recover from the Board of Education for money thus advanced cannot be doubted. The Board of Education is now a separate municipal corporation and may be sued by the City for a debt. The question of the right of the City to sue the Board of Education was very recently decided in favor of the City in a case in which the City recovered a judgment for approximately \$11,500 for fees of the Inspector of Weights and Measures. The Board of Education filed a demurrer to the City's declaration, stating as ground of demurrer that the Board of Education was an arm of the State and therefore could not be sued, and also that in suing the Board of Education the City was in effect suing itself. The Circuit Court sustained the demurrer, but on appeal the Appellate Court, in the case of *City of Chicago v. Board of Education*, 246 Ill. App. 406, reversed this decision and sent the case back for trial, with the result that the City recovered judgment. This is undoubtedly the law, and therefore the right of the City to recover is clear. The Board of Education can be compelled to pay for money advanced for the purposes of schools as proposed whether the tax levy is sufficient to meet the obligation or not.

(No. 6330—December 4, 1928—R. C. O'C.)

ENDURANCE CONTEST, ROLLER SKATING.

The conduct of endurance contests of every nature, including roller skating, is by ordinance prohibited within the City of Chicago.

Hon. William F. Russell, Commissioner of Police:

The letter of December 4th with application for amusement license attached in which you request an opinion as

to whether there should be issued a license for the purpose of conducting an endurance roller skating contest has been referred to the writer for consideration and reply.

We call your attention to an ordinance passed by the City Council November 21, 1928, and published in the Proceedings of the Council of that date, page 3965, which provides that "it is hereby unlawful for any individual, person or company to conduct endurance contests whatsoever in the City of Chicago." The second provision of the ordinance prohibits the City Collector from issuing any license for such purpose and the third section provides that the ordinance shall take effect at once.

We are of the opinion that the issuing of the license would violate this ordinance and be contrary to the law.

(No. 6331—December 5, 1928—L. H.)

REGISTERED BONDS, TRANSFER, AUTHORITY FOR.

Direct written authority from one who is not the owner or holder of a registered bond is necessary to effect a transfer to bearer, an assignment in blank being insufficient.

Hon. George K. Schmidt, City Comptroller:

You referred to us a request from the First National Bank of Chicago to transfer to bearer \$150,000 of bonds of the City of Chicago which are registered in the name of the Greater New York Savings Bank. You ask us to advise you whether the request for transfer is in proper form.

The only request for transfer to bearer that you submitted is one from the First National Bank of Chicago

which is not the owner of the bonds. The documents submitted show the authority of the president of the Greater New York Savings Bank to make assignments, and the resolutions authorizing him to make assignments of certain bonds, but these do not state that he is to transfer the bonds to bearer, and his assignments are all in blank, just the same as the authority to make assignments is in blank in all cases. Under these circumstances, while the parties are responsible and will stand by what they direct, it is possible that one of these assignments may at some time in the future have the name filled in and be presented in that way.

We do not think the transfer should be made unless there is direct order from the Greater New York Savings Bank to make the transfer to bearer.

(No. 6332—December 5, 1928—F. J. V.)

CIVIL SERVICE EMPLOYEE, REINSTATEMENT, BACK PAY.

The reinstatement of an officer or an employee who has been suspended for a greater period than 30 days entitles him to back salary where the money appropriated for his office or position has not been paid to another during the period of suspension and reinstatement; but no such salary is due such officer or employee for the first 30 days of the suspension.

Hon. William F. Russell, Commissioner of Police:

We have your recent request for an opinion in the matter of a claim for back salary made by John Hraha, a patrolman in the Police Department, by virtue of the annexation of Mount Greenwood. You submit the written

statement of claim made by the claimant's attorney. According to this statement—

“Hraha was sworn in June 2, 1927, worked that evening and the next evening suspended ‘pending investigation’ and during all of the time that has since elapsed up to the date of his restoration, his name was carried on the by-weekly payroll, from the station to which he was assigned, passing through the police, civil service and comptroller’s departments, with the words ‘suspended pending investigation’ written after his name.”

Official opinions of the Corporation Counsel approved June 15, 1927, and another June 16, 1927, determined the questions of the claimant's right to become a patrolman of the City of Chicago and to draw his salary as other policemen of the City. On October 18, 1927, an official opinion was approved as to the status of this claimant and other patrolmen coming from Mount Greenwood upon its annexation to the City. Recently the claimant made formal written demand for reinstatement to his position as such patrolman. Pursuant to such demand and a request for an opinion and direction, the Corporation Counsel, on November 14, 1928, advised the Commissioner of Police to restore Patrolman Hraha to the payroll. On this advice, reinstatement of the claimant was made, and the demand is now presented for back salary alleged to be due claimant “for the period that has elapsed since the receipt of the City's check for the one day he served on June 2, 1927.” As to the first thirty days of this period of claim, we are of the opinion that no salary may be collected because it is within the lawful power of a head of a department to suspend his subordinate for a reasonable period not to exceed thirty days. It is provided by section 12 of the Civil Service Act that “nothing in this Act shall limit the power of any officer to suspend his subor-

dinate for a reasonable period not exceeding thirty days." Independently of such provision, however, we think it within the necessary and reasonable jurisdiction of a department head to suspend a subordinate for good cause. The Supreme Court, considering matters of discipline as such cause, said:

"While, undoubtedly, the head of the department would necessarily have the power to suspend a subordinate for these causes if the head of a department were to have any control over such subordinate or anything to say about the management of his department, there are a great many causes, other than those given by counsel for appellant, which might make a suspension or layoff of the employees of a department necessary. Can it reasonably be said, under the clear and explicit language of the statute, that the head of the department has not the power to lay off employees under him for periods of less than thirty days for lack of work, lack of funds or other good cause?"

As to the remaining period of time for the back salary claimed, we think the question is decided in the case of *O'Connor v. City of Chicago*, 327 Ill. 586. That case holds that a *de jure* officer or employee may not recover salary where the same has been paid by the City to a *de facto* incumbent during the time he has performed the duties of the office prior to the reinstatement of the *de jure* officer or employee. It also holds, however, where the money appropriated for such office or position has not actually been paid to another, that the *de jure* officer or employee, upon his reinstatement, is entitled to recover such salary. It is therefore a question of fact in the claimant's case whether he is entitled to the back salary here demanded.

The claimant does not state the facts with reference to whether or not the salary which he seeks has been paid

to a *de facto* during the period for which he claims such salary. Such facts are necessary for a final determination of the question of the claimant's right to salary here demanded.

(No. 6333—December 6, 1928—G. F. M.)

MUNICIPAL EMPLOYEES' ANNUITY AND BENEFIT FUND,
REFUND.

Moneys paid into the Municipal Employees' Annuity and Benefit Fund by a person who represents himself as one who had taken the civil service examination and had been certified into the service may be refunded upon demand or the discovery of the error.

*Retirement Board, Municipal Employees' Annuity and
Benefit Fund:*

Replying to your request for an opinion as to the refund rights of a person working for the City under the civil service certificate of another person, the following is submitted:

Your letter states that during the period from June 21, 1926, to January 10, 1927, one Charles Mikulecky worked for the City of Chicago under the name and certification of Fred Belsan; that while working under the name of Fred Belsan, pension deductions were made from the salary of Mikulecky in accordance with the Municipal Employees' Annuity and Benefit Fund Act; that your fund, being unaware of any irregularity in the matter, credited these deductions to the account of Fred Belsan because of the fact that this was the name indicated on the payroll and because of the fact that Fred Belsan was a member

of the fund; that Mr. Mikulecky never was and never had been a member of the fund and that Mr. Mikulecky has petitioned for a refund to him of the deductions which were made from his salary and which had been credited to the account of Fred Belsan.

Section 1 of the Act provides that this fund is for the benefit of municipal employees employed by the City.

Section 12 of the Act provides that the term "municipal employee" shall mean—

"Any person who was, is or shall be employed by such City or the Board of Education of such City and who has been or who shall be appointed to his position in the service of such City or Board of Education under and by virtue of an 'Act to regulate the Civil Service of cities' approved and in force March 20, 1895, as subsequently amended, and any person employed by such City or the Board of Education of such City who was appointed to the service of such City or Board of Education prior to the date upon which the said Act shall have come into force and effect in such City."

From the facts stated in your communication it is apparent that Charles Mikulecky was not a "municipal employee" within the spirit or meaning of the above definition for the reason that he was never appointed by virtue of the Civil Service Act but fraudulently secured his position in the City service by representing himself to be another man named Fred Belsan who had taken the civil service examination and who has been certified into the service.

Under the circumstances as presented Mikulecky was not entitled to any of the benefits of this fund, was not entitled to be treated as a "municipal employee," and deductions made from his pay were made in error.

I am of the opinion that deductions made from the salary of Charles Mikulecky and credited to the account of

Fred Belsan should be refunded to the said Charles Mikulecky, less benefits or moneys paid to Charles Mikulecky out of this fund during his said employment, if any were so paid.

(No. 6334—December 6, 1928—F. J. V.)

1 GAMBLING, "PLAY GOLF" IS NOT.

The device "Play Golf" which consists of metal balls enclosed in a glass case and is operated by means of a lever upon the deposit of a coin in a slot and thereby playing a miniature game of golf is not a gambling device.

2 GAMBLING, "FOOTBALL GAME" IS NOT.

The contrivance "Football Game" which consists of 22 miniature metal men operated by means of levers released upon the deposit of a coin in a slot is not a gambling device.

3 GAMBLING DEVICES, TEST.

In order to bring within the statute prohibiting gambling a contrivance, device or game it must be one "upon which money is staked or hazarded, or into which money is paid or played upon chance, or upon the result of the action of which money or valuable thing is staked, bet, hazarded, won or lost"; and any such contrivance, device or game which merely affords amusement and a test of skill is not a gambling device.

Hon. William F. Russell, Commissioner of Police:

We are replying to your request for an opinion as to whether or not certain devices of the Chester Power Amusement Company, Incorporated, of 75 East Wacker drive, Chicago, Illinois, are gambling devices. Accompanying your request is a communication addressed to you by the attorneys of this company. This communica-

tion describes two devices and submits therewith a picture of one of them, a device called "Play Golf."

This device is enclosed in a glass case, and is so contrived as to permit by the use of metal balls the playing of a miniature game of golf. The device is operated by means of a lever which may be used upon the deposit of a coin in a slot provided for that purpose.

The second of these contrivances is a "Football Game." This is also enclosed in a glass case, and consists of twenty-two miniature metal men. This machine also is operated by means of certain levers which are released upon the deposit of a coin in the slot provided for that purpose. Upon the deposit of the coin and the operation of the levers, first by one person and then by the other, a ball is kicked back and forth by the metal men until it is driven into the goal hole at one end or the other of this device.

The opinion submitted to you on November 27, 1928, upon a similar inquiry as to the gambling character of a device known as "The Billiard Skill" applies in its entirety to these two devices inquired about. In that opinion we quoted the statute in force July 11, 1919, on the subject of "Slot machines and other gambling devices." That statute, after specifying certain machines or devices, then includes others which may come within the following provision of the statute, viz.:

"Or any other device upon which money is staked or hazarded, or into which money is paid or played upon chance, or upon the result of the action of which money or valuable thing is staked, bet, hazarded, won or lost."

This test must apply generally to determine in the case of any contrivance, device or game, whether or not in its construction and operation it is necessarily of a gambling

character. Applying this test to these two devices, called "Play Golf" and a "Football Game," we are convinced that neither of these games or devices has any gambling character about it—either in its construction or its operation.

We have personally inspected and operated both these devices, and we discovered no way in which either of the devices may of itself win or lose anything for its operation. Each of these machines in itself affords only amusement and a test of skill. Each device is of the character of a billiard or pool table, for the use of which in playing its game, the operator pays the regular price charged therefor. In this respect, these machines are similar to "The Billiard Skill," which was the subject of the recent opinion referred to, for which reason the former opinion has full application here.

(No. 6335—December 7, 1928—J. R.)

DAMAGES, "DANIEL McCOOL" SHIP.

The City is not liable to the Cement Transit Company for alleged damages to the ship Daniel McCool claimed to have been sustained while said ship passed through the east draw of the North Avenue Bridge, as all reasonable precautions for the ship's safety had been observed on the part of the City to pass the ship through said draw.

Hon. John S. Clark, Chairman, Committee on Finance:

You recently requested a report of Honorable Richard W. Wolfe, Commissioner of Public Works, and also submitted some correspondence and a statement in the claim

of the Cement Transit Company for damages to their ship "Daniel McCool," and same was transmitted to this office because we had all the previous correspondence in the above claim.

The North avenue bridgetender, Mr. F. S. Freund, reported that on June 25, 1927, at about 10:58 p. m. the ship "Daniel McCool" signaled for the bridge. The bridgetenders, Mr. Freund and Mr. Palewiz, were all set to raise the bridge when they discovered that they could not raise the west leaf. Mr. Freund then waved his red lantern thereby indicating that there was trouble. The ship then proceeded close to the bridge and Mr. Freund (through his megaphone) advised the captain of their predicament; he asked the captain if he could get through the east draw, and the captain said he could. Mr. Palewiz then raised the east half of the bridge, and the boat went through. Mr. Freund says he felt a slight jar as the boat was passing. The bridge was repaired that night and the next morning Mr. Freund said he could see no evidence of damage to the bridge.

I am also informed that the east draw of the North Avenue bridge is seventy-two (72) feet wide and that the ship "Daniel McCool" is between twenty-five (25) and thirty (30) feet wide, and it is therefore evident that the boat, properly handled, could easily have passed through the east draw.

The captain being advised and seeing the existing condition of the west draw should not have proceeded through the east draw unless he was certain that his boat would pass through safely.

It is therefore my opinion that the captain assumed full responsibility when he proceeded through the east draw, and that the claim should be denied.

(No. 6336—December 7, 1928—F. J. V.)

GAMBLING, PENNY TARGET PRACTICE AND BALL GUM VENDER IS GAMBLING DEVICE.

A contrivance which consists of a cabinet with glass openings on top and sides at one end of which there is a target and at the other end a pistol, the barrel of which protrudes into the case and is manipulated from the outside thereof by inserting a penny in the pistol, permitting the return of the penny if the target is hit and the retaining of the penny if the shot is missed, constitutes a gambling device within the meaning of the statute.

Hon. William F. Russell, Commissioner of Police:

There has been submitted a request for an opinion as to the gambling character of a contrivance or device called "No. 49 Little Perfection Penny Target Practice and Ball Gum Vender."

This device consists of a cabinet with glass openings on the top and sides. At one end there is a target at which a penny is shot from a pistol, the barrel of which protrudes into the case. A penny is inserted in the pistol which is manipulated from the outside of the case. If the target is hit the penny comes back to the operator. If, however, the shot misses the penny is not returned. This contrivance, so far as this operation goes, constitutes a gambling device pure and simple. Nor do we believe that this gambling feature of the device is avoided by the second contrivance for extracting a ball of gum from the same machine by pressing another lever in a second and separate operation. This second feature of the device consists of balls of gum in the lower part of the case which are extracted therefrom by pressing a certain lever.

The Specialty Manufacturing Co., Inc., in their circular presenting a picture and description of this device give

their own description and operation of the machine in the following language:

“To play the Target Machine Ball Gum Vender one simply inserts a penny in the pistol—aims at the Bull’s Eye—and pulls the trigger. Gum delivery mechanism is substantially made of metal. By pushing lever at the front of machine, ball of gum is delivered for each penny that drops into the machine. If Bull’s Eye is scored, penny is returned but no gum delivered. When pennies drop into machine, no gum is delivered unless the lever is pushed. Gum is attractively displayed through glass top and sides.”

This is an ingenious device, the pistol and target of which is in itself and of itself a gambling device. In the operation of this feature there is no vending element whatever involved. If the penny does not hit the target it goes into the till of the machine to be kept by its owner or lessee. The mere privilege that the operator has, who has lost his penny by missing the target, is to take from the case by another operation a ball of gum which does not relieve the entire device of its incriminating gambling character. The machine, both in its construction and operation, is primarily a gambling device. As well might the loser in the operation of this machine be extended the general privilege of the storekeeper to take a ball of gum or some other trinket from the counter. The attractiveness of this device, especially to the young, is such as to entice them to operate the gambling feature of the device until their pennies are exhausted, without any care or wish on their part to fill themselves up with gum balls which they might get from the operation of the second feature of the machine.

In arriving at this conclusion that “No. 49 Little Perfection Penny Target Practice and Ball Gum Vender” is a gambling device we have applied the description of a

gambling device contained in the statute in force July 11, 1919, on the subject of "Slot Machines and other gambling devices." That language is as follows:

"Devices upon which money is staked or hazarded, or into which money is paid or played upon chance, or upon the result of the action of which money or valuable thing is staked, bet, hazarded, won or lost."

The device here pictured and described is very materially different in its construction, operation and purpose from "The Billiard Skill," which was the subject of our general opinion on gambling devices submitted to you on November 27, 1928, and the devices known as "Play Golf" and "Football Game" which were the subjects of a similar opinion submitted to you on December 6, 1928.

Although the device here found to be a gambling device is also called a vending machine, it does not offer a legitimate vending operation, for the company's descriptive circular admits in so many words, "*when pennies drop into machine, no gum is delivered unless the lever is pushed.*"

In conclusion, we may state that our opinion of November 27, 1928, and particularly the statutes on gambling and gambling devices and the City ordinances thereon, apply generally to this device and its operation.

(No. 6337—December 7, 1928—G. F. M.)

MUNICIPAL EMPLOYEES' PENSION, SERVICE AND CREDIT RIGHTS, LAYOFF PERIOD.

No service credit can be given under the present statute (section 51, Municipal Employees' Annuity and Benefit Fund Act of June 29, 1921, as amended) for a period of layoff occasioned by lack of work or lack of an appropriation. The only periods of service for annuity purposes which may be counted being: (1) The time during which an employee performs the duties of his position; (2) the period of his vacation; (3) any period of leave of absence with whole or part pay; (4) any period of leave of absence not longer than 90 days without pay; (5) any period of disability with disability benefit; and (6) any period of disability with whole or part pay.

Retirement Board, Municipal Employees' Annuity and Benefit Fund:

Replying to your request for an opinion as to service and credit rights of a municipal employee during a period of layoff because of lack of work, the following is submitted:

Your letter states that Frank A. Miller, Superintendent of Shops, was certified on May 29, 1906; that he was laid off on December 31, 1921, because of the fact that the shops were closed and that his position was not appropriated for after that date; that he has, therefore, been on the list since December 31, 1921; that you have given him credit for service from the year 1906 to December 31, 1921, and have set up an accumulation for prior service for him and his wife for that period, to wit, sixteen years; that Mr. Miller is now 55 years of age.

Your question is as to whether or not Mr. Miller is entitled to additional service credit for the period of time he was laid off from January 1, 1922, to date.

Section 51 of the Municipal Employees' Annuity and Benefit Fund Act provides that in computing the term of service rendered by any municipal employee subsequent to December 31, 1921, the following periods of time shall be counted as periods of service for annuity purposes:

"1: Any period of time during which said Municipal employee shall perform the duties of his position.

"2: Any period of vacation.

"3: Any period of leave of absence with whole or part pay.

"4: Any period of leave of absence without pay not longer than ninety (90) days.

"5: Any period of disability for which such Municipal employee shall receive any disability benefit.

"6: Any period of disability for which a Municipal employee shall receive whole or part pay."

It will be noted that the Act does not provide for any service credit during any period of layoff occasioned by lack of work or lack of appropriation.

Your Honorable Body, being the Trustees of this fund, are rigidly bound by the provisions of the Act creating the fund and can neither add to nor subtract from the terms or conditions provided for the administration of the fund. Hence, when no service credit is provided for in the Act for a period of layoff, no such service credit can be allowed by your Board. The Pension Board is a quasi-judicial body (*Eddy v. People*, 218 Ill. 611) and is controlled by the same rules of law which control the courts in the enforcing of a pension law; and the courts have no power to change the statute. *Stiles v. Board of Trustees*, 281 Ill. 636, 642.

I am of the opinion that Frank A. Miller is not entitled to any service credit for the period he was laid off subsequent to December 31, 1921.

(No. 6338—December 8, 1928—F. J. J., F. J. V., I. H.)

1 CIVIL SERVICE, CITY CLERK'S OFFICE, TEMPORARY EMPLOYEES.

Temporary employees in the office of the City Clerk can only be appointed with the approval of the Civil Service Commission for a period of 60 days or until the Civil Service Commission can certify regular appointments from an eligible list; and if there are temporary employees in such office who have not been thus appointed, it is the duty of the City Clerk to dismiss such employees just as soon as it can be done without interference with and seriously hindering the business of the City and to secure appointments in a regular way.

2 WORDS AND PHRASES.

The term "extra clerk" is synonymous with "temporary clerk" as the two kinds of clerks ordinarily do exactly the same class of work.

Hon. Patrick Sheridan Smith, City Clerk:

We are in receipt of your letter of November 20, 1928, requesting information relative to the recent injunction order issued by Judge Friend, and desiring information concerning,

- (1) "Which temporary employees in the City Clerk's Office, if any, are affected by the Injunction order?"
- (2) "If any are affected, what is the last permissible date for their employment in the position which they are now filling?"

The injunction order issued by Judge Friend, in the matter of *Michael J. Chambers v. City of Chicago et al.*, requires the strict adherence to the Civil Service Act and prohibits the further employing of or the continuing in employment any person or persons who have not complied with the civil service laws and with the civil serv-

ice rules of the City of Chicago, with respect to the examination and certification for employment in the classified civil service of the City of Chicago in any and all cases, respectively, where there is any civil service eligible, etc.

In the opinions and decisions of the Corporation Counsel, page 249, 1897 to 1905, the proposition of clerical hire in the City Clerk's office is well covered by C. H. Fyffe, Assistant Corporation Counsel, whose opinion states, as follows:

In the case of *People v. Loeffler*, 175 Ill. 585, an original petition for mandamus was filed in the Supreme Court against the City Clerk of Chicago, alleging that he had neglected to notify the Civil Service Commissioners of vacancies in the positions of certain clerks and other employees in his office, and to make requisition on the Commissioners for the names of persons to fill such vacancies. The City Clerk, answering, contended that none of the places of employment in his office was within the scope and meaning of the Civil Service Act, and that he had the sole power and authority to fill such vacancies without regard to the Act. "In this case, the court ordered the writ issued in accordance with the prayer of the petitioner, so as to include within its mandate, not only all the employees of the City Clerk's office, but also the Deputy City Clerk."

We beg to call your attention to the provision of the Civil Service Act, pertaining to temporary employment, which reads as follows:

"To prevent the stoppage of public business, or to meet extraordinary exigencies, the head of any department or office may, with the approval of the Commission, make temporary appointment to remain in force not exceeding sixty days, and only until regular appointments under the provisions of this act can be made."

The language used in this provision is clear and specific and cannot be misconstrued. The "approval" of the Commission is required by law and we cannot construe the language used in any other manner than its plain meaning and intent, i. e., that the Commission be formally notified in the event of the necessity for temporary appointments, in advance of such appointments, and that the Commission approve the individuals named, in the event they have no eligible to certify, and that the appointment be made only for a period not to exceed sixty days or until regular appointments under the provisions of the Act can be made.

Therefore, in view of the provisions of the Civil Service Act and Rules made by them and the decisions of the Supreme Court, your first query must of necessity be answered as follows: That all temporary employees in the office of the City Clerk holding offices for which there is a Civil Service eligible list are affected by the injunction order and that such temporary employees can only be appointed with the approval of the Civil Service Commission, had in advance of their appointment, and then only, for a period of sixty days or until the Civil Service Commission can certify regular appointments from the eligible list if there is one and, if not, call an examination for such position.

Answering your second query, it is our opinion that all those employes holding temporary appointments not made in accordance with the above requirements should be dismissed just as soon as possible, without interfering with or seriously hindering the business of the City, and that immediate application be made to the Civil Service Commission for certifications from eligible list, if there is one, to fill the said positions, and if no such eligible list, for an examination to create such eligible list.

In my opinion, the title "extra clerk" is synonymous with "temporary clerk" inasmuch as the test seems to be just what kind of work is performed by each and from personal inquiry in your department, I find that, regardless of title, they do exactly the same work as the temporary or ordinary clerks, and this seems, therefore, rather an evasion or possibly an attempt to circumvent the Civil Service Law. Such clerks come well within the above quoted section of the Civil Service Act and application should be made, as prescribed, for the appointment of all needed extra help, regardless of the title of the departmental appropriation from which they are paid.

(No. 6339—December 10, 1928—L. H.)

1 ELEVATED STRUCTURE AT LA SALLE STREET BRIDGE,
RAISING, COST.

In view of the previous permits, agreements and ordinances involving the elevated structure in Carroll avenue and North La Salle street an arrangement between the City and the Northwestern Elevated Railroad Company for a division of the expense of altering said structure to provide a clear span of 90 feet between the columns of said structure and the full head-room for a distance of 86 feet from curb to curb is proper and just.

2 PUBLIC UTILITIES, ELEVATED STRUCTURE, READ-
JUSTMENT, COST.

The principle or rule that a public utility occupying the streets of a city must conform its structures and equipment to the changes made necessary by the use of streets for purposes of travel may be qualified or limited by an agreement made between the City and the public utility at the time that the latter is given permission to erect a structure in the streets.

Hon. Richard W. Wolfe, Commissioner of Public Works:

We have again taken up, for further consideration, the question of whether the City of Chicago should contribute toward the cost of readjusting the elevated railroad structure in Carroll avenue at North La Salle street. An opinion was rendered on this matter under date of August 30, 1928, but that was based on the Northwestern Elevated Railroad Company ordinance of January 8, 1894, and the City's police powers. We stated therein that no contract exists between the City and the company which specifically provides for the apportionment of expense between the parties in a case of this kind.

Since that opinion was written a letter was sent to you by the Northwestern Elevated Railroad Company calling

attention to the fact that under the terms of the ordinance of July 17, 1908, granting further rights to this company and especially providing for the structure in Carroll avenue, a permit was issued containing certain conditions that were accepted, which has a bearing on the subject and in a measure defines the respective rights and obligations of the parties.

The permit just mentioned contained the following conditions:

“This permit is granted by the Commissioner of Public Works and accepted by said Northwestern Elevated Railroad Company upon the express condition and understanding that at the crossing of La Salle avenue the columns supporting said Company’s structure shall be placed on lines parallel to the center line of La Salle avenue and spaced 32 feet each way from the center thereof so as to provide a clear opening on La Salle street of 64 feet between centers of columns.

“This permit is granted and accepted upon the further express condition and understanding that should the City of Chicago hereafter determine to construct a bridge across the Chicago River at La Salle street, and a viaduct in connection therewith leading over the tracks of the Chicago & Northwestern Railroad Company, said Northwestern Elevated Railroad Company shall modify the structure referred to in the plans and specifications in such a way as to provide a clear minimum head-room of 14 feet between the top of the roadway of such traffic viaduct and the lowest part of the floor system or supporting girders over said viaduct throughout the whole width of 64 feet.”

It will thus be seen that there was an agreement with respect to this matter which must be taken into account at this time. The gist of this agreement, so far as it bears on the present controversy, is that the company agreed to bear the expense of reconstruction of its tracks and elevated structure so as to provide clear head-room of 14

feet for a width of 64 feet. It is proposed now that there should be a clear span of 90 feet between columns of the elevated railroad structure and full head-room for the distance of 86 feet from curb to curb.

This plan of having so large a clear roadway underneath the elevated structure is a departure from the original plan as provided by the ordinance authorizing the construction of the La Salle Street Bridge. That ordinance was passed on July 15, 1924 (Council Journal, pp. 3480-81), and provides for an approach over Carroll avenue with a protection island about the columns of the elevated railroad structure, which would probably mean a much smaller cost to the elevated railroad company than even the 64 foot clear roadway.

The provision in the bridge ordinance bearing on this point reads as follows:

“The north approach between the bridge proper and the south line of Kinzie street shall consist of a viaduct and filled approach extending the full width of the street so to be widened and improved having a roadway eighty-six (86) feet wide between curbs, except over Carroll avenue where a protection island will be built about the columns supporting the elevated railroad structure and except for a distance of approximately 146 feet south of the south line of Kinzie street where an inclined ramp will be provided in the center of the street to meet the lower level of La Salle street, at which location a roadway twenty-eight feet six inches (28' 6'') wide will be provided on each side of the street adjoining the curb lines. The ramp leading to the lower level will provide a clear roadway of twenty-three (23) feet width. On both sides of the viaduct sidewalks each seventeen (17) feet clear will be provided.”

We are therefore confronted with a specific agreement for a 64 foot roadway to be provided by the elevated railroad company, which has never been abrogated or re-

pealed, and which if modified at all, was changed by the bridge ordinance, under which the company would have less expense than under the agreement.

Under these circumstances it is doubtful whether the mere fact that engineering requirements make it desirable to widen the clear roadway originally proposed would be sufficient ground for demanding the payment of the entire expense under the police powers of the City. The principle that a public utility occupying the streets must conform with its structure and equipment to the changes made necessary by the use of the street for purposes of travel is well established, but it has some limitation beyond which the municipality cannot press it. That is to say, when the City at the time the public utility is given a permit to erect its structure exacts an agreement to the effect that the public utility must change its structure in a certain way when the necessities of travel require it, the City is not in a position to require more than a strict fulfillment of the terms of such agreement when the time comes to make the change.

It seems that the elevated railroad company has made overtures to you looking towards a division of the expense of altering the structure in question, so that the company will pay as its share the cost of the 64 foot roadway while the City should pay the cost of the additional width now deemed necessary or expedient. It is our opinion that under the conditions above set forth it would be proper and just to make such an arrangement.

It is stated by the company in its letter to you that a division of the cost in accordance with this proposed arrangement has already been agreed upon by the engineers representing the respective parties, and embodied in a tentative ordinance submitted by you to the company on March 26, 1928, and that this was returned with the com-

pany's approval on April 6, 1928. If that is the case, and if such ordinance is still satisfactory to both parties, our recommendation is that the same be forwarded to the City Council for action.

(No. 6340—December 15, 1928—L. H.)

BOND FUNDS, TRANSFER.

Bond funds appropriated under different names but intended for the same purpose may be transferred from one fund to the other and commingled and treated as a single bond fund.

Hon. George K. Schmidt, City Comptroller:

We are in receipt of a letter from the Deputy Comptroller in which he calls attention to two items of appropriations on which transfers were authorized by the City Council on December 12, 1928. See Council Journal, p. 4105.

The two transfers were for the sums of \$3,324 and \$1,800, respectively, from Accounts 469-L-231 and 469-L-232, both of which accounts appear in the annual appropriation bill as appropriations from "Western Avenue Widening and Improvement Bond Fund." The amounts are to be transferred to Accounts 469-B-132 and 469-B-131, which appear in the appropriation bill as appropriations from the "Western Avenue Improvement Bond Fund." It is stated that these two bond funds are treated as separate and distinct in the Comptroller's office, and the question therefore arises whether such transfers as proposed by the order of the Council will be lawful.

The bonds in both of the issues above mentioned were passed for the identical purpose, and therefore appropriations could be made from either one of them for the purposes of the appropriations in question.” The only reason the funds are not commingled in the two bond issues is because, in preparing the ordinances authorizing the bond issues, the Law Department caused the bonds to have a different name. This was done under the belief that this was desirable because the different issues could thereby be identified. We were advised, however, by your department, some time ago, that there was no object in distinguishing the issues in this way, and that it would facilitate the handling of the accounts if all issues for the same purpose were designated by the same title. The funds in the various issues for the same purpose could then be commingled, and remnants, transfers, and extra accounting could thereby be avoided.

Since the funds of either of the issues could be used for the purposes of the appropriations which the Council desires to transfer, there is no legal objection to the making of the transfer. It would be otherwise if the transfer was to be made to a bond fund that was not available for the purposes of the appropriation. As the matter now stands, it is only a question of which of the funds shall be depleted. Since one of them is apparently exhausted, the law undoubtedly gives the Council the right to draw on the other which is available for the same purpose.

(No. 6341—December 17, 1928—J. W. B.)

WAGE LOAN CORPORATION, DIRECTORS, APPOINTMENT.

Upon the organization of a wage loan corporation and the establishment of a principal office in the City of Chicago it is the Mayor's duty to appoint one director for such corporation.

Hon. William Hale Thompson, Mayor:

Under the terms and provisions of an act entitled "An Act to provide for the incorporation, management and regulation of wage loan corporations and to allow the loaning of money by such corporations secured by assignment of wages, and limiting the rate of compensations to be paid," corporations may be organized in Illinois under and by virtue of the provisions of said Act in the same manner as corporations for pecuniary profit.

Corporations organized under the provisions of this Act must have a capital of not less than \$25,000, and may loan money on wage assignment, but in no case shall the amount loaned to any one person exceed the sum of \$250. Section 358 of the Act provides as follows:

"The Governor of this State and the Mayor of the City in which the principal office of said corporation shall be located shall each appoint one director who shall not be a stockholder or employee of such corporation, whose term of office shall be two years unless sooner removed by the Governor or Mayor who made the appointment, and the said directors shall have the same power and authority as the other directors of the corporation. The number of directors of any corporation shall not exceed nine."

Under the provisions of said Act, when any wage loan corporation is organized and has its principal office in the City of Chicago, it becomes, and is your duty to appoint one director for each of said wage loan corporations.

(No. 6342—December 27, 1928—J. W. B.)

1 APEX CLUB, AMUSEMENT LICENSE NOT NECESSARY.

The Apex Club being an association not for profit requires no amusement license so long as it furnishes amusement only to its members at the Club's expense.

2 LICENSES, AMUSEMENT.

A club incorporated as an association not for profit which furnishes entertainment or amusement to its members at the expense of the club and not for profit or gain requires no amusement license.

3 MUNICIPAL CODE OF 1922.

Section 176 of the Municipal Code of 1922 does not apply to a club or association organized not for profit and which furnishes amusement to its members at the club's expense.

Hon. William F. Russell, Commissioner of Police:

Replying to your communication of the 7th instant requesting us to advise you as to whether or not it is necessary under the City ordinances for the Apex Club to secure an amusement license, we desire to state that it is apparent that this club is incorporated under the laws of the State of Illinois, and from your communication, and other information obtained, that admission is by key given to each of the members of the club, and that they have music and dancing, and serve food to their members and guests only, in their club rooms, and that no admission fee is charged.

Section 176 of the Chicago Municipal Code of 1922 regulating the licensing of places of amusement reads as follows:

“All theatricals, shows and amusements offered, operated, presented or exhibited for gain, or for admission to which the public is required to pay a fee, are hereby divided into the twenty-two classes here-

inafter designated. Such theatricals, shows and amusements are, for the purpose of this chapter, hereinafter referred to by the general term 'entertainments,' and the theater, opera house, auditorium, hall, park, grounds, gardens, tent or other enclosure within which it is intended to produce, offer or present any such entertainments, for the purpose of this chapter, is hereinafter referred to by the general term 'place.' "

The ordinance regulating the issuance of amusement licenses makes twenty-two different classifications of the various forms of entertainment or amusement. Section 177 of the said ordinance is as follows:

"No person, firm or corporation, either as owner, lessee, manager, officer or agent, shall give, conduct, produce, present or offer for gain or profit any of the entertainments as specified in the preceding section without first having obtained a license therefor."

We assume that this club is incorporated as an association not for profit, and that the music and entertainment is furnished by the members of the club.

It will be noted in the sections above quoted that the ordinance provides that a license is required when any entertainment is offered or presented for gain or profit or for admission to which the public is required to pay a fee; thus, if this club gives any entertainment or furnishes entertainment or amusement to its members at the expense of the club and not for profit or gain to the club, then we are of the opinion that the provisions of the amusement ordinance do not apply, and that the club is not required to obtain an amusement license.

(No. 6343—December 27, 1928—L. H.)

SPECIAL ASSESSMENTS, COLLECTION, ANNEXED TERRITORY.

The collection of special assessments for an improvement which is wholly within the territory annexed under proceedings begun prior to annexation is made by the City or the municipality to which the territory had been added.

Hon. Michael J. Faherty, President, Board of Local Improvements:

We are in receipt of a letter from Mr. C. D. Hill, Engineer of the Board of Local Improvements, in which he makes inquiry concerning the collection of the remaining installments of a special assessment levied for an improvement in territory about to be annexed to the City.

The inquiry relates to a portion of the Village of River Grove which lies immediately south of the territory recently annexed located west of Harlem avenue and north of Belmont avenue. It is stated that a triangular portion of the village extends north of Belmont avenue into the tract now annexed, and that this causes an awkward situation for the planning of improvements, particularly sewers. It seems that the owners of the land in this triangle desire to have it annexed to the City of Chicago, but before the village authorities will consent to such annexation they want to know what effect such annexation will have on special assessment proceedings already instituted. There is one of these proceedings instituted for a system of water supply pipes lying wholly within the said triangle.

While questions sometimes arise where the improvement lies only partly within the territory to be annexed, there

can be no doubt as to the procedure and the respective rights of the City and village where the whole improvement is within the territory to be annexed.

The annexation in this instance, if it takes place, will be under the provisions of the Annexation Act of 1889, entitled, "An Act to provide for the annexation of cities, incorporated towns and villages, or parts of same, to cities, incorporated towns and villages." Section 10 of said Act reads as follows:

"When a part of a city, village or incorporated town is annexed to another city, village or incorporated town under the provisions of this Act, and prior to such annexation proceedings had been instituted for the purpose of improving any streets within such detached portion by special assessment or special taxation, then in such case such proceedings may be carried to a finality, whether the whole improvement be within the detached portion or not. If the whole improvement is to be made within the detached portion, then the amount collected by such proceedings shall be paid over to the city, village or incorporated town to which such territory is annexed, to be used by such city, village or incorporated town for the purpose for which such proceedings were instituted. If only a part of such improvement is to be made within the detached territory, then the city, village or incorporated town from which such territory is detached may proceed with the same as though such annexation had not taken place." Cahill's Statutes, 1927, p. 389.

If matters remain in dispute at the end of sixty days after such annexation, under the provisions of section 13 of the Act they are to be submitted to the Circuit or County Court. There does not seem to be room for dispute, however, in the proposed annexation, so far as this special assessment matter is concerned.

(No. 6344—December 29, 1928—L. H.)

1 CARE AND BOARD OF COUNTY PRISONERS, CLAIM AGAINST COUNTY.

About 65 per cent of all inmates of the House of Correction are County prisoners for whose boarding and care there is now due to the City approximately \$2,500,000.

2 HOUSE OF CORRECTION, APPROPRIATION FOR CARE AND BOARD OF COUNTY PRISONERS, REFUSAL.

It is lawful for the City Council to refuse to appropriate for boarding and care of County prisoners until a suitable and equitable agreement is entered into between the County and City of Chicago to receive and keep in the House of Correction any person or persons who may be sentenced or committed thereto by proper authority.

Hon. John S. Clark, Chairman, Committee on Finance:

His Honor, the Mayor, transmitted your letter of December 20, 1928, which was addressed to him, to this department, together with a copy of his reply to you. This correspondence has reference to the housing and boarding of County prisoners at the House of Correction.

In your letter to the Mayor you state that the City Comptroller has advised the City Council that Cook County owes the City of Chicago a large amount of money, approximately two and one-half million dollars, for the boarding and care of County prisoners at the House of Correction; that these prisoners constitute about 65 per cent of all the inmates; that there is at present no contract between the City and County for the housing and boarding of such prisoners; and that you have been directed by the Committee on Finance to advise the Mayor that it will recommend no appropriation for carrying on this activity for the benefit of the County unless and until a suitable and equitable agreement is made between Cook

County and the City of Chicago and the necessary appropriations are made by the County authorities to reimburse the City of Chicago for the expenses thus incurred in behalf of the County. You also state that, in view of the fact that there is no existing valid agreement of this kind, the recommendation will include a direction that no future prisoners will be accepted at the House of Correction.

The Mayor has not indicated what he wants the Department of Law to do in the matter, but we assume that, inasmuch as any such action as proposed will precipitate legal questions, the first thing to do is to advise you concerning the legal aspects of the proposed recommendation of your committee.

Section 8 of the Act of the General Assembly under which the City is authorized to establish Houses of Correction that relates to the housing and boarding of County prisoners reads as follows:

“The board of supervisors or commissioners of any county, and the board of trustees of any village or town, in any county in this State, in which a house of correction is established, shall have full power and authority to enter into an agreement with the legislative authority of such city, or with any authorized agent or officer on behalf of such city, to receive and keep in said house of correction, any person or persons who may be sentenced or committed thereto, by any court or magistrate, in any of said counties. Whenever such agreement shall have been made, it shall be the duty of the board of supervisors or commissioners for any county in behalf of which, such agreement shall have been made, or of the trustees of the village or town, in behalf of which, such agreement has been made, as the case may be, to give public notice thereof, in some newspaper printed and published within said county, for a period not less than four weeks, and such notice shall state the period of time for which such agreement will remain in force.” Cahill’s 1927 Statutes, p. 1399.

It is manifest, from the wording of the above section, that no obligation is imposed on the City of Chicago to house and board prisoners of the County of Cook in the absence of an agreement between the City and County authorities. It would also seem, from the fact that the public notice provided for requires that it should state the period of time for which the agreement will remain in force, that when the period provided for in the agreement expires any obligation to continue to house prisoners of the County is at an end. Nevertheless, the question of whether any such prisoners can be turned loose and whether prisoners sent to the House of Correction by the courts can be refused admission are matters which will require careful consideration on the part of both the City and County authorities.

For the present, it will probably be sufficient to advise you that the proposed action is lawful, and that it will be proper to reduce the appropriations for the House of Correction to the extent that it may be cut down in view of the intention to refuse County prisoners in the future. When the time comes for taking action in regard to the refusal of prisoners the City Council should pass an ordinance precisely defining its attitude and giving the Superintendent of the House of Correction positive directions as to what he shall do or refuse to do. This will be necessary in order to avoid possible complications and contempt proceedings.

We have asked the Comptroller to give us a statement of the account up to date, and we will begin suit to collect the amount due the City as soon as the City Council will direct us to do so. For that purpose we have drafted, and we submit herewith, a proposed form of order which the City Council should be asked to give consideration to.

(No. 6345—December 31, 1928—L. H.)

SPECIAL ASSESSMENT VOUCHER, PAYMENT.

The pendency of a suit against former members of the Board of Local Improvements concerning the action of the Board taken in letting contract for the public improvement in satisfaction of which a special assessment voucher has been issued is no legal excuse for its non-payment unless enjoined.

Hon. George K. Schmidt, City Comptroller:

We are in receipt of your letter of the 29th instant concerning demand made on you for payment of a special assessment voucher which is due today. Attached to your letter is a copy of the demand of the owner of the voucher, the Loewenthal Securities Company. You state in your letter that you have not received reply to letters which you say you sent us under dates of October 23, 1928, November 27, 1928, and December 10, 1928. The writer has your letter of December 10, 1928, which relates to a similar demand on the part of the State Bank of Chicago, but we have no record of the other two letters of which you speak.

The demand from the Loewenthal Securities Company, which you referred to us, is for the sum of \$46,350 and interest, which money has been collected on account of Special Assessment Warrant No. 51783, for paving Torrence avenue from 962 feet south of 110th street to 121 feet south of 124th street. It appears that the money is in the City treasury ready for disbursement, and that the only reason why payment is being withheld by you is because some suits are pending against the present and former members of the Board of Local Improvements concerning the action of the board in the letting of con-

tracts, of which the contract for this improvement was one. The Loewenthal Securities Company states that it is the bona fide purchaser for value of the vouchers in question, which were issued to the Calumet Coal Company in payment of work done under the warrant above mentioned.

While there may be some nice questions in relation to the status of the vouchers as negotiable instruments and the rights of innocent purchasers with respect to same, none of these questions would have any bearing on the situation with regard to this demand as it is presented to us.

The mere pendency of suits brought against the individual members of the Board of Local Improvements personally can not stand in the way of the City of Chicago in meeting its obligations on vouchers duly issued in the regular course of business. In fact, it could have no such effect even if the suit were against the City, or against its officers in their official capacity. The statute governing such a situation was passed in 1917, and reads as follows:

“That in the absence of an injunction or restraining order of a court, the bringing or pendency of any suit alone, heretofore, or hereafter brought, to defeat or enjoin the disbursement by public officers of public funds to the persons, uses, or purposes for which they are appropriated or set apart, including the payment of the salaries and wages of all officers and employees of the State, or of any county, city, village, town or other municipality of the State, shall in no way change the liability of any public officer in the disbursement of public funds, as aforesaid, on account of any notice of matters contained in the pleadings in any such suit but such liability shall remain the same, in so far as the bringing or pendency of any such suit alone is concerned, as if no such suit had been brought.” Cahill’s Statutes, 1927, p. 1753; Smith’s Statutes, 1929, p. 1976.

Technically speaking, the suit involving the validity of the contract cannot be regarded in connection with paper issued to a contractor for work done on the improvement which is now in the hands of a purchaser for value. It furnishes no excuse for withholding payment when the money has been collected from the property owners and is available for payment.

In our opinion the vouchers should be paid as they become due. To defer payment on them would reflect discredit on the City and impair the value of its special assessment paper, besides being an injustice to the owner of the paper.

(No. 6346—December 31, 1928—L. H.)

OFFICIAL NEWSPAPER, CHICAGO JOURNAL OF COMMERCE.

The Chicago Journal of Commerce which publishes market reports and general news regarding financial activities of stock exchange, bank and other financial institutions, insurance news, real estate news and general news and which in its circulation is not confined to a particular class of people but is accessible to the general public upon news stands and elevated stations, is a newspaper of general circulation and is entitled to become the official newspaper of the City.

Hon. George K. Schmidt, City Comptroller:

You have submitted to us a memorandum showing the bids received by you on December 18, 1928, from newspapers desiring to be named as the official newspaper of the City, in response to the advertisement for that purpose. It appears from this memorandum that the Chicago Journal of Commerce is the low bidder, but you state that

there is some question in your mind as to the "Chicago Journal of Commerce" being a publication of general circulation.

We assume from what you say in your letter that the "Chicago Journal of Commerce" has brought itself within the terms of the competition, and, therefore, if it is qualified, it is entitled to the contract.

We could not hold that the said paper is disqualified by reason of anything you say in your letter, since you give us no information whatever in regard to its character or circulation. From what the writer has himself observed, it would seem that the paper is a newspaper of general circulation, as that term is understood and interpreted by our courts.

It is true that the paper devotes its space principally to financial matters, but that is not the test of whether or not it is a newspaper of general circulation. It has been held in this State by the Supreme Court that newspapers devoted principally to information of importance to lawyers only were newspapers of general circulation. (*Kerr v. Hitt*, 75 Ill. 51; *Maass v. Hess*, 140 Ill. 576; *Railton v. Lauder*, 126 Ill. 219.) In *Pentzel v. Squire*, 161 Ill. 346, it was held that a law journal having a circulation among both laymen and lawyers and which publishes, in addition to decisions of courts and digest of cases, general news of importance to the public, is a newspaper of general circulation.

From information at hand, it would seem that the "Chicago Journal of Commerce" publishes market reports and general news regarding financial activities of stock exchanges, banks and other financial institutions, insurance news, real estate news, and general news, that its circulation is not confined to a particular class of people, that it

is sold from news stands and at elevated railroad stations, and that the general public has access to and purchases the papers. Unless something is shown that puts a different aspect on it than that which the writer has gathered, as expressed above, the publication will have to be regarded as a newspaper of general circulation.

(No. 6347—January 5, 1929—L. H.)

LOST CHECK OR NEGOTIABLE INSTRUMENT, PROCEDURE.

In case the payee of a check has lost or destroyed it, the proper method for him to pursue is to bring suit under section 14 of the Negotiable Instrument Act and secure judgment and an order for its payment upon giving bond for double the amount of the check, unless the amount is small, in which case a duplicate check may be issued upon the giving of bond without bringing suit.

Hon. George K. Schmidt, City Comptroller:

You forwarded to us correspondence and bond of the Clay County National Bank of Spencer, Iowa, and asked us to approve the bond if the form was good and return it to you.

It seems that the bank several months ago received a check from you, which has been either lost or destroyed. The question is whether you should issue a duplicate of this check under the protection that the bond gives you.

In cases of this kind it has been the uniform practice of the Department of Law to advise that the party who lost the negotiable instrument should bring suit under section 14 of the Negotiable Instrument Act. That sec-

tion specifies the procedure to be followed in cases of lost instruments, and if this is followed it furnishes absolute protection to you. It provides that the party should give bond in double the amount in response to the order of the court granting judgment to such party.

In the present instance, if you feel yourself sufficiently secured on so small a sum as \$24, the bond will undoubtedly be a protection to you in case the original check should at any time turn up. In other words, since the amount is so small, if you are disposed to let the party have a new check without bringing suit as is usually done, you will probably be sufficiently protected by the bond, which we have marked as good in form and which we return herewith.

(No. 6348—January 8, 1929—L. H.)

SPECIAL ASSESSMENT BONDS, ISSUANCE, PENDENCY OF SUIT.

Special assessment bonds may be issued to redeem a voucher given under a contract which is being litigated because claimed to be illegal where the issuance of such bonds has not been enjoined.

Hon. George K. Schmidt, City Comptroller:

In a letter of recent date you asked for advice from the Corporation Counsel with respect to the request of the State Bank of Chicago for the issuance of special assessment bonds for the amount of \$5,600, on voucher No. 2220, payable to the R. F. Conway Company. You stated that this was for work done under Warrant No. 52645, Installment No. 3, Estimate No. 2, but you were

undecided as to your course in the matter because the legality of the contract in question was attacked and is now the subject of a court proceeding.

We answered a somewhat similar question which arose on the demand of the Loewenthal Securities Company, our letter to you being under date of December 31, 1928. The situation was slightly different in that case, but the legal principles involved are the same. In the case of the Loewenthal Company the voucher was due for payment in cash, while in the present instance the voucher is to be redeemed by the issuance of bonds. Otherwise the cases are identical, and the same rule should govern your action now as in the former case. That is to say, the pendency of the lawsuit, which in any event is not directed at the City's officers in their official capacity, should not interfere with the handling of the paper in question in the regular course of business. The statute from which we quoted in the opinion we rendered, as stated above, expressly provides that the mere pendency of such a suit shall have no restraining effect and that the liability of the officer is unchanged thereunder.

If there is anything about the present situation that has not been covered by the opinion of December 31, 1928, and it is called to our attention, we will endeavor to give you further advice, but we believe you will find that all points have been fully covered.

(No. 6349—January 9, 1929—L. H.)

1 STREETS UNDER PARK COMMISSIONERS, IMPROVEMENT, COST OF REARRANGING ELECTRIC LIGHTS.

Street lights are a part of a street and the expense of changing the light equipment in a street under the jurisdiction of Park Commissioners, which street is being improved, should be borne by the Park Commissioners; so in case the cost thereof is advanced by the City, the Park Commissioners should reimburse the same.

2 STREETS UNDER PARK COMMISSIONERS, IMPROVEMENT, COST OF CHANGING FIRE ALARM AND POLICE TELEGRAPH EQUIPMENT.

The cost of changing fire alarm and police telegraph equipment in a street under the jurisdiction of Park Commissioners, which street is being improved, must be borne by the City.

3 STREETS, IMPROVEMENT, CONFORMING TO SAME, COST.

Parties who put the streets to an extraordinary or special use beside the main use of public travel must conform to the necessities of traffic and alter their equipment to meet the needs of the enlarged traffic use.

Hon. Michael J. Kennedy, Commissioner of Gas and Electricity:

We are in receipt of your letter of recent date in which you make inquiry concerning the proper disposition of the charges for rearranging electric light and fire alarm and police telegraph wires on Augusta street from Elston avenue to Kedzie avenue.

You state in your letter that the assessment for widening Augusta street between the streets indicated, a distance of approximately $2\frac{1}{2}$ miles, has just been confirmed, that the street is under the jurisdiction of the West Chicago Park Commissioners, that the cost of rearranging the

existing electric light and fire alarm and police telegraph equipment is estimated at \$17,500, that there is no provision made for payment in the widening ordinance, and that you are advised by the consulting engineer of the West Park Commissioners that the sewer work and electrical work is to be completed this year.

The question you desire to have answered is whether, under the circumstances, you would be justified in charging the work to the general corporate fund appropriations. You state that in your opinion the West Chicago Park Commissioners should reimburse the City for the work.

We have ascertained that the local improvement in question is being made by the West Chicago Park Commissioners, and that the City is only interested on account of its sewers, electrical equipment, water equipment, etc. In other words, the expense of the improvement should fall on the Park Board, except so much of it as the City is bound to incur in order to make its own equipment conform to the improvement. Such being the case, the expense that the City will have must necessarily be paid out of the general corporate fund unless there is some bond fund available, and there is no bond fund for the purpose.

With respect to reimbursement from the Park Board, there is ground for demanding reimbursement for the expense of changing the light equipment, because the installation of street lights is a part of the street improvement, but as for the fire alarm and police telegraph equipment, there seems to be no ground for demanding reimbursement. The rule which applies in the case of such equipment, as well as the water equipment, is that the parties who put the street to some extraordinary or special use besides the main use of public travel must conform

to the necessities of traffic and alter their equipment to meet the needs of the enlarged traffic use.

Our answer to your question, therefore, is that the changes which you are required to make must be paid for out of the general corporate fund. The question of reimbursement for the change in the street light equipment may be taken up with the West Chicago Park Commissioners when you are prepared to present a bill for the work.

(No. 6350—January 9, 1929—L. H.)

1 ANNUAL APPROPRIATION ORDINANCE, GAS AND GASOLINE LAMP OPERATION, CONDITION.

An appropriation for "gas lamp operation" and "gasoline lamp operation" with a condition that no expenditure shall be made from the appropriation except upon further order of the City Council, renders the appropriation invalid.

2 ANNUAL APPROPRIATION ORDINANCE, CONDITION OR STRING INVALIDATES APPROPRIATION.

The insertion or addition of a clause after an appropriation to the effect that it shall not be used without further action by the City Council renders the appropriation void for want of certainty, unless such condition is severable from the appropriation or the expense covered by the appropriation might or might not be undertaken dependent upon some future contingency.

Hon. William Hale Thompson, Mayor:

You forwarded to the Department of Law a communication from the Commissioner of Gas and Electricity, under date of January 7, 1929, in which he called attention to two items of appropriation to the Department of Gas

and Electricity contained in the Annual Appropriation Bill for the year 1929 which has just been acted on by the City Council, concerning which you ask for advice.

The two items of appropriation are for "Gas Lamp Operation" and "Gasoline Lamp Operation," respectively, and attached to each appropriation is a condition that "no expenditure shall be made from this appropriation except upon further order of the City Council." The question arises whether the attaching of such a condition renders the appropriations invalid.

There are two distinct principles involved in the consideration of the question before us. One of these is whether the condition robs the appropriation of that certainty that is required by law. The other is whether the proposed further consideration of the appropriation by the legislative body invades the province of executive officers who are charged with the administration of the affairs of the City.

The nature of the appropriation in each case is such that it requires further action of the Council before any money can be expended. Under such circumstances there is, in fact, no appropriation. There is no setting apart of money which may be used. All that has been done is that a sum has been specified which at some future time, after further action on the part of the Council, may ripen into an appropriation. Appropriations cannot be made with rubber attachments that cause them to bounce back.

It has always been held that the rule of *strictissimi juris* applies in the levying of taxes, and this, in the case of municipalities in this State, relates back to the making of the appropriation. In other words, the law must be strictly followed or the appropriation is void. Thus, in *People ex rel. Stuckart v. Arnold Bros.*, 282 Ill. 305, it

was held that the insertion of a clause after the appropriations for each department to the effect that a certain percentage was to be deducted from the total for the department rendered the entire appropriation void. The following excerpts from that case are strictly in point here:

“Section 1 of article 8 provides for a levy ordinance, in which shall be ascertained the total amount of appropriations for all corporate purposes legally made and to be collected from the tax levy of the fiscal year, specifying in detail the purposes for which such appropriations are made, the amount appropriated for each purpose, and levying the amount so ascertained upon the taxable property within the city. The levy ordinance must be preceded by the appropriation bill, and no levy can be made for any purpose without a previous appropriation. * * *

“The statute requires that the ordinance shall specify not only the objects and purposes for which the appropriations are made, but the amount appropriated for each object or purpose. It is not sufficient to specify a gross amount appropriated for several purposes. The answer of counsel for the appellee is, that the deductions made in various parts of the ordinance are no more than directions to the heads of departments to save the amount of money indicated; that there could be no doubt as to what the appropriations are for, and it is the individual items, and not the total, for which appropriations have been made. * * *

“There is no doubt, therefore, that the latter amount, and not the aggregate of the items, is the amount intended to be appropriated, and the appropriations affected by this deduction were invalid because the amounts of the items appropriated for were not itemized but only the aggregate amount of the appropriation for all purposes in each department.”

In the same way, it follows that the insertion of a clause after an alleged appropriation to the effect that the appropriation cannot be used without further action amounting to a sort of secondary appropriation renders the appropriation void for want of certainty.

On the other proposition—the interference with the functions of the executive officers—the rule to be applied is well stated in the case of *Schwartz v. City of Chicago*, 223 Ill. App. 184. The court there held that if the purpose for which the appropriation is made is fixed with certainty, then no condition can apply, and that a condition can only be attached where some uncertainty exists as to whether or not the thing appropriated for is to be done. The court said, among other things:

“Where a specific appropriation is made for an expense that is reasonably certain to be incurred, we are of the opinion that no condition can legally be attached to the expenditure of the money in the appropriation ordinance.”

The law with respect to conditions attached to an appropriation may be summarized by saying that if the expense covered by the item of appropriation might or might not be undertaken, dependent on some future contingency, then the condition is lawful. But in the case of operation of lamps in the streets, there can be no doubt that the Council intended that this activity should be maintained, and therefore a condition which makes it necessary for the Council to take further action before the appropriation can be used has the effect of nullifying the attempted appropriation—it is not an appropriation.

An appropriation can do no more than set aside a fund for a purpose named. When it undertakes to create a situation whereby the executive officer who has the duty of administering the fund is prevented from using it until the Council approves his action there is an invasion of the functions and prerogatives of the executive officer which renders the appropriation invalid.

It might be contended that only the condition is invalid in the present instance. It may be that the courts

would hold that the invalid condition is severable from the enacting clause. But this is problematical. The two items of appropriation are for the necessary purpose of the operation of gas and gasoline lamps in the Department of Gas and Electricity throughout the City for the ensuing year, and the sums appropriated are therefore certain to be expended for the purposes appropriated. The appropriations therefore are such as must be made by the City Council and such as we may reasonably assume that the Council would have made even without the invalid conditions attached. Under these circumstances the appropriation is unquestionably void as it stands. This conclusion is supported by the case of *Schwartz v. City of Chicago*, *supra*.

The invalid conditions attached to the appropriated items may be severable from the appropriations themselves, but there is no way of telling whether the courts will hold them severable. We would not recommend taking the chance of having the invalid portion held severable.

(No. 6351—January 12, 1929—L. H.)

1 SWITCHING TRACKS, CHICAGO GREAT WESTERN RAILWAY COMPANY.

Switching tracks across Central avenue are occupied and operated by the Chicago Great Western Railway Co. under ordinance of the Town of Cicero of September 5, 1885.

2 SWITCHING TRACKS, REGULATION.

The Illinois Commerce Commission has jurisdiction over railroad or railway switching regulations and not the City, and all grievances against railway or railroad companies should be brought before that Commission.

3 MUNICIPAL CODE OF 1922.

Sections 3391 to 3409 of the Municipal Code of 1922 concerning construction and operation of switching tracks are now being enforced by the Illinois Commerce Commission and not by the City.

Hon. John S. Clark, Chairman, Committee on Finance:

We are in receipt of a letter addressed to you which you transferred to this department for an opinion, in which Mr. W. B. Templeton asks a series of questions relating to the rights of the Chicago Great Western Railway Company in operating switch tracks across and using a portion of Central avenue, a busy thoroughfare, as a switching yard.

The regulation of the switching in question is now under the control of the Illinois Commerce Commission, to whom complaints should be directed. By reason of that change in jurisdiction some of the things asked do not require an answer. The other questions we repeat and answer as follows:

“Under what authority does the Chicago Great Western Railroad maintain and utilize continuously a series of switching tracks across Central Avenue

(5600 West and 800 South), and frequently and dangerously switch cars, make up trains, and utilize that part of Central Avenue as a portion of their freight distribution and switching yard, to the daily detriment and danger of school children and of thousands of employees in the plants or homes adjacent, and to the delay and danger of foot or motor traffic in its broadest details?"

The Chicago Great Western Railroad Company operates under several grants which authorize it to extend its tracks over lands acquired by it and intervening streets. The particular place mentioned is covered by the ordinance passed by the Town of Cicero on September 5, 1885. (See Special Ordinances, 1915, p. 492.) Among the clauses of that ordinance are the following:

"And, also, at any and all times hereafter, to lay down upon adjoining lands which it may acquire, and maintain and forever use such switches, siding, turnouts, yards and track connections with any railroad now or hereafter constructed.

"And for said purposes the right is hereby granted to cross with said tracks all of the streets, highways, alleys and railroad tracks upon or along the line of said routes, switches, sidings, turnouts, yards and track connections."

Whether or not the railroad company is abusing its privileges to the extent of occupying a street that it has no right to and using it as a switching yard is hard to say without making an investigation and survey. If that is the case, it is doubtful whether anything can be done by the City unless it should appear that the company had not obtained the necessary consent in the first instance. That is to say, anything in the way of checking its switching activities is not within the City's jurisdiction, the City's only recourse being a complete ouster if the street is being unlawfully held. All police powers as to the

amount of switching, the manner of switching, the danger to the public, etc., are in the hands of the Illinois Commerce Commission.

“What are the ordinances establishing or governing the construction and maintenance of switch or main tracks of steam and electric railways, when built and maintained above street grade adjacent or crossing?”

The City has a series of ordinances governing the construction and operation of switch tracks on and across streets, most of them contained in article III of chapter LXVI of the Chicago Municipal Code of 1922—sections 3391 to 3409, inclusive. As already stated, the enforcement of these ordinances has passed out of the City's hands. The Illinois Commerce Commission has adopted these ordinances as a part of their rules, but whether they are being enforced, and by what officers, is problematical.

We recommend that the parties who have these grievances against the railroad company should file their complaints or in some other manner take up these matters with the Illinois Commerce Commission. Any attempt to regulate through the action of the City Council would be futile.

(No. 6352—January 16, 1929.)

ALDERMANIC NOMINATIONS, PETITION, CITY CLERK'S DUTY.

The duty of the City Clerk with reference to a nominating petition for alderman is simply to receive the petition, file it and then certify the name to the Board of Election Commissioners who are empowered to hear objections to the printing of such name upon the ballot. The City Clerk has no power to pass upon the correctness or sufficiency of such petition.

Hon. Patrick Sheridan Smith, City Clerk:

Replying to your inquiry of January 14, 1929, as to your authority and duties in connection with petitions for nomination of aldermanic candidates, I wish to advise you that your duties in connection with the receiving of petitions of aldermanic candidates are only ministerial, and that all questions as to the validity of such petitions under the law, will have to be determined by the Board of Election Commissioners of the City of Chicago.

The Act providing for the election of Aldermen in the City of Chicago provides in part as follows:

“All such petitions (meaning Aldermanic petitions) and procedure with respect thereto, shall conform in other respects in the provisions of the election and ballot laws then in force in the City of Chicago concerning the nomination of independent candidates for public office by petition.” Section 7, part four of article XII, Cities and Villages Act, paragraph 191, page 369, Smith's Statutes, 1927.

Section 10 of an Act providing for the printing and distribution of ballots at public expense, and for the nomination of candidates for public offices, to regulate the manner of holding elections, and to enforce the secrecy of the

ballot, approved June 22, 1891, of Smith's Statutes of 1927, chapter 46, page 1246, provides:

"The certificates of nomination and nomination papers being so filed and being in apparent conformity with the provisions of this act, shall be deemed to be valid, unless objection thereto is duly made in writing. * * * In any case where such objection is made, notice shall forthwith be given to the candidates affected thereby, addressed to their places of residence as given in the nomination papers and stating the time and place when and where such objections will be considered: Provided, that in cities, towns or villages having a Board of Election Commissioners such questions shall be considered by such board and its decision shall be final."

It will therefore be seen that the City Clerk is charged with no duty with respect to the correctness or sufficiency of the petitions but simply to receive it for filing and then certify the name to the Board of Election Commissioners who are empowered to hear any objections to the printing of such name upon the ballot.

(No. 6353—January 22, 1929—F. J. V.)

CIVIL SERVICE, REINSTATED EMPLOYEE, BACK SALARY.

Upon the reinstatement of a civil service employee and proof that no one occupied his position during suspension and that there is an appropriation from which he may be paid, he is entitled to back salary for the full period of suspension except the first 30 days thereof.

Hon. John S. Clark, Chairman, Committee on Finance:

The claim which you have submitted to the Law Department for a report and opinion has been practically settled in two former opinions thereon of dates December 5th and December 15th, copies of which are attached hereto as constituting the material part of our present report to you. These opinions, while practically disposing of this claim, we think should be supplemented with the following observations:

Pursuant to an opinion of the Corporation Counsel this claimant was "transferred to and made part of" the Police Department of the City of Chicago by reason of the annexation of Mount Greenwood. The next day, June 3, 1927, the claimant was suspended and not permitted to render any further service or draw any more salary until November 27, 1928, when upon demand and an opinion to the Commissioner of Police, he was reinstated in his position and restored to duty. Having been thus reinstated in his position any right of action that he may have for back salary has accrued. *City of Chicago v. People*, 210 Ill. 84, 93; *Kenyon v. City of Chicago*, 135 Ill. App. 227; *Kenneally v. City of Chicago*, 220 Ill. 485.

The claim, as filed with the Finance Committee is "for salary in the sum of \$3916.66 for services as patrolman

in the City of Chicago, from June 3, 1927, to November 27, 1928."

It is upon the same claim for which demand was made, that the two opinions above referred to were rendered. It will be observed that in our first opinion of date December 5, 1928, we held that the claimant was not entitled to salary for the thirty day period of suspension from June 3d to July 3d, 1927. As to the remainder of the claim we held that under the recent decision of the Supreme Court in *O'Connor v. City of Chicago*, 327 Ill. 586, the claimant would also not be entitled to the salary of his position if the same had been paid to *de facto* patrolman who had rendered the services during period of this claim. Subsequently upon a second communication to the Commissioner of Police in which the additional information was presented, the matter was again referred to us and we wrote the second opinion of date December 15, 1928. In this opinion, upon a complete presentation of all the facts as therein stated, we held that the claimant was entitled to his salary as stated in the present claim filed with the Committee because such salary had not been paid to a *de facto* officer, except, as already indicated, the salary for the period of thirty days of his lawful suspension, to wit, from June 3, 1927, to July 3, 1927.

We believe, therefore, as already stated in our former opinions, herewith submitted, that the claimant is entitled to payment of his claim for all of the period stated except for the first thirty days thereof. See also Opinion No. 6332.

(No. 6354—January 22, 1929—F. J. V., J. W. B.)

1 CIVIL SERVICE, TEMPORARY APPOINTMENT.

A temporary appointment under the Civil Service Law with the approval of the Commission and not to exceed 60 days may be made only to prevent stoppage of public business or to meet extraordinary exigencies where there is no vacancy; a temporary appointment cannot be made where there is a vacant civil service position and there exists a civil service eligible list from which the position can be filled.

2 CIVIL SERVICE, VACANCY, TEMPORARY APPOINTMENT.

The transfer of a civil service employee such as a fire marshal to the Pension Fund for an indefinite period on account of physical or mental disability, does not create such a vacancy as to make necessary the certification and appointment of one from the civil service eligible list, and a temporary appointment in such a case can be made to meet the exigencies or requirements of public business.

Hon. A. W. Goodrich, Fire Commissioner:

Your communication of the 8th instant directs attention to an opinion of the Corporation Counsel of date June 9, 1927, directing the reinstatement of a Battalion Chief to his position, who had been transferred to the Pension Fund on account of disability. That opinion points out that upon the removal of such disability the fireman is entitled to an immediate reinstatement to his former position. You refer to the opinion as holding that "this separation from the department is not considered to be a permanent one and that no actual vacancy occurs in the department as a result thereof." Your communication continues with this statement:

"The point upon which I would like your advice and opinion is, in the event, say for instance, a Division Fire Marshal were to be retired in accordance

with the manner set forth in the aforesaid paragraph, would the writer be acting properly and in accordance with the law should he appoint to the position left by the Division Fire Marshal, a temporary Division Marshal, although there is in existence a Civil Service list for the position of Division Fire Marshal?"

We think the answer to this question is to be found in the very language of the Civil Service Act itself, in that portion of section 10 of the Act which provides for temporary appointment in the following language:

"To prevent the stoppage of public business, or to meet extraordinary exigencies, the head of any department or office may, with the approval of the commission, make temporary appointment to remain in force not exceeding sixty days, and only until regular appointment under the provisions of this act can be made."

It will be observed that but two reasons are stated for making a temporary appointment in any case, namely, (1) "to prevent the stoppage of public business," and (2) "to meet extraordinary exigencies." We can conceive of no case in which a temporary appointment can be authorized under the language of this section, where there is a vacant civil service position and there exists a civil service eligible list for filling it. The crucial question therefore is, does a vacancy exist?

You refer in your communication to the custom of the department of carrying on the regular payroll for a period of twelve months, under section 1199 of the Municipal Code, any member of the Fire Department becoming disabled while in the discharge of his duties or by reason of or as a consequence of the performance of such duties, provided his disability shall last that time. The validity of this ordinance provision as to its conflict with section 9

of the Pension Fund Act is now in issue in the case of *People ex rel. Millard v. William Hale Thompson et al.*, now pending in the Appellate Court.

The provisions of section 9 of the Firemen's Pension Fund Act of necessity place the retired fireman on an enforced leave of absence during the indefinite period of his disability and may create a vacancy in that position which, by the demands of the public service and the decisions of the courts under the Civil Service Act, must be filled by the appointment of another civil service eligible to the position. Cahill's Stat., 1927, par. 950, p. 915; *People ex rel. Roderick v. City of Chicago*, 283 Ill. 462; *People ex rel. Waters v. Finn et al.*, 241 Ill. App. 621.

And this is so notwithstanding such disabled fireman, by the provision of the Pension Fund Act, must be reinstated to his position upon recovering from his disability, and that therefore no permanent vacancy can be said to exist in such case. It is because no permanent vacancy exists that a certification and appointment from an eligible list may not be required, but that a non-civil service temporary appointment may be made to fill the position. Although a temporary or sixty-day appointee may not be retained indefinitely or until the disabled fireman shall recover and report for reinstatement, yet in such case the appointment may be warranted by the civil service rule for holding position open for an absentee.

The case of the *People ex rel. Roderick v. City of Chicago*, above cited, is instructive on both the law and duty involved in the case presented by your communication. The relator, Roderick, by mandamus, sought to compel his certification and appointment to the position of superintendent of machinery in the Fire Department. He alleged in his petition that the holder of the position had been granted a leave of absence for one year, had filed

a resignation to take effect at the end of the year, had not returned to duty but had since become a non-resident of Chicago and the State of Illinois. Petitioner also alleged, though this was denied, "that the fire marshal (commissioner) had pretended to appoint to the position one Culbertson, who had never taken a civil service examination and whose name had never been posted as eligible or certified by the commission for the place. * * * The answer denies that a vacancy exists, that petitioner is legally entitled to be certified or appointed to the position, or that it is the duty of the fire marshal to notify the commission of the existency of a vacancy in the position or to make requisition for the certification of the name of the person standing highest on the register of eligibles."

The court in its decision said: "There are only two questions in the case: Is there a vacancy in the position, If so, is the filling of it discretionary with respondents? The latter question must be answered in the negative." Continuing the court said: "If a vacancy existed in the position of superintendent of machinery it was the duty of the fire marshal to notify the commission of the fact and the duty of the commission to certify the name of the petitioner. *Prople v. Kipley*, 171 Ill. 44." The court then cites the rules of the Civil Service Commission and further says: "These sections provide for leaves of absence of officers or employees, and they contemplate a right to return and hold the office or employment only in case the absence has not exceeded thirty days, or, in case of injury in the service, sickness or other cause, ninety days." The rules of the Commission at present do not contain these express limitations, but instead provide for a leave of absence "for such period as (the head of the department) sees fit, not exceeding one year," and also pro-

vide for the reinstatement of the absentee upon return at the expiration of his leave of absence, providing his position has not in the meantime been filled by the certification of an eligible from the civil service list. The court continuing says: "There can be no doubt that the fire marshal (commissioner) had a right to make an appointment of a superintendent of machinery under the rules, and such appointment could only be made in case there was a vacancy in the office. The civil service rules do not permit the holding of positions open for officers or employees for a longer period than thirty days, or, in case of injury in the service, sickness or other disability, ninety days" (under the present rules, for a longer period than fixed by the leave of absence). In this case it was held that there was such vacancy as required the certification and appointment of a civil service eligible, and the petitioner's appointment was ordered.

In the case suggested by your communication of a Division Fire Marshal who may be transferred to the pension fund for an indefinite period on account of physical or mental disability, we do not believe that such a vacancy is thereby immediately created as makes necessary the certification and appointment of one from the civil service eligible list. Both grounds specified in section 10 of the Civil Service Act exist in this case, we think, to warrant the Fire Commissioner, with the approval of the Civil Service Commission, to make temporary appointment. The position made temporarily vacant should not go unfilled; and the exigencies of the situation, in our opinion, are at least two, namely: (1) The pensioner's right to immediate reinstatement to his position upon recovery from a disability which may prove to be of comparatively short duration; (2) the necessity otherwise to make immediate promotion, not only to the temporarily vacated position,

but also to every other position below that in the same line of service, and the consequent confusion and possible impairment of the public service in the Fire Department on account of the demotion of all such temporary civil service appointees to their former positions upon the reinstatement of the disabled fireman, perhaps but a short time after his transfer to the pension fund.

It necessarily follows from the decision of the *Roderick case* that it is lawful by rules of the Civil Service Commission to hold a position open for an absentee until his return for reinstatement. And the Pension Fund Act provides that upon recovery of the disabled fireman at any time he shall be entitled to immediate reinstatement. It seems to us therefore that if a position may be temporarily vacant by absence for a period not to exceed a year under the rules of the Commission, and such position held open for reinstatement of the absentee, there is stronger reason why the position of a disabled fireman who was transferred to the pension fund should have his position held open for his reinstatement within a year, when under the provisions of the Pension Act he is entitled to reinstatement whenever his disability is removed without limitation of time as to such reinstatement. Furthermore, we observe that in the *Roderick case*, above cited, the petition for mandamus in behalf of the civil service eligible was not brought until the expiration of the time limit of one year of leave of absence.

Subject to the conditions and limitations pointed out in the foregoing opinion and in proper compliance with the provisions of section 10 of the Civil Service Act, we think the appointment of a temporary, non-civil service holder of the position in question may be made.

(No. 6355—January 25, 1929—F. J. V.)

1 REWARD, POLICE OFFICER, WHEN AND WHEN NOT ENTITLED TO.

A public officer can neither contract for nor receive a reward for the discharge of his official duty, he being already compensated in the way of salary or fees for the same; but an officer may be entitled to a reward where services are rendered by him at a time when he was under no official duty to do so and was acting entirely outside of the scope of line of duty.

2 REWARD, POSTING.

No legal responsibility attaches to the Department of Police in approving and posting a reward offered by a private person or corporation.

Hon. William F. Russell, Commissioner of Police:

We have received from you the communication of the Great Atlantic & Pacific Tea Company in which they offer rewards for the apprehension of persons who have burglarized their stores or robbed their employees, together with your request for "an opinion as to the form in which the reward is worded, and as to what responsibility, if any, the Police Department would assume if such a reward was posted." The company's communication is as follows:

"We would like to amend our reward plan submitted to your department on June 16, 1928, to read as follows:

"The Great Atlantic & Pacific Tea Company will pay a total of \$100.00 to any group of persons, including private citizens or officers, giving information leading to the arrest of any burglar or burglars or robber or robbers who participated in any burglary against our premises, or robbery of any of our employees in line of duty. The above \$100.00 to be divided in accordance with the joint recommendation

of the Tea Company and the Commissioner of Police of the City of Chicago; a total of \$500.00 to the officer or officers connected with the case upon the conviction of any person or persons who has or have burglarized our premises or robbed our employees while on duty; and a total of \$1,000.00 to the officer or officers connected with any case upon the conviction of any criminal or criminals who shoot or injure by gunfire any of our employees while on duty, or any of our customers while on our premises.

"In any of the above offers, any person or persons furnishing proper information, either for the arrest or conviction, will be considered as a participant or participants in the reward on an equal basis with the officer or officers connected with the case.

"The above rewards to be paid after each case has been investigated and recommendations approved by the Chief Commissioner of Police of the City of Chicago.

"If the above plan meets with your approval, we shall appreciate your acknowledgment."

As to the form of this offer or promise to pay rewards, it is, stated by the "Legal Department, Middle Western Division, W. S. Young," "to amend our reward plan submitted to your department on June 16, 1928." The amendment, however, is so general and complete in itself as perhaps to constitute a substitution for the original plan. The language is plain and can readily be understood without comment thereon.

The form of this offer, however, is quite immaterial, for, although it is submitted to you with the concluding request that "if the above plan meets your approval we shall appreciate your acknowledgment," no binding contract obligation can result from any expression of approval or acceptance of such offer in any form by the Commissioner of Police, or any policeman.

It is an old established rule of the common law, continued uniformly throughout the States, that an officer

cannot lawfully contract for or receive a reward for the discharge of a duty which is already exacted of him by law and for which he is fully compensated by salary or fees. Such contracts are void as against public policy (34 Cyc. 1753, 23 R. C. L. 1126) and as being without consideration. (Page on Contracts, vol. 1, sec. 586; vol. 2, sec. 896; 13 Corpus Juris 351, sec. 208.) The reason for the rule as to consideration, stated in Corpus Juris, *supra*, is that, "since a public officer is at law required to perform his duties for his salary or other stated compensation, a promise to pay him more than this is founded on no consideration, for he is simply promising in return to do, or is actually doing, what he is (already) bound to do." The reasons why such contracts are void as against public policy are variously stated in the text books and decided cases and we shall not attempt to repeat them. The principal cases affecting peace officers, policemen, sheriffs,—are *Mason v. Manning* (Ky.), 150 S. W. 1020, 43 L. R. A. (N. S.) 131; *Lees v. Colgan* (Cal.), 52 Pac. 502, 40 L. R. A. 355; *Kick v. Merry* (Mo.), 66 Am. Dec. 658.

The Illinois cases in point are *Hogan v. Stophlet*, 179 Ill. 150; *Mahoney v. Whyte et al.*, 49 Ill. App. 97. The Supreme Court in the *Hogan case*, just cited, reviews many of the leading cases on the subject and says (p. 156):

"It being true, that it was the official duty of the appellant, as sheriff, to make the arrest of the guilty party, and that the fees, which he is entitled to charge for the performance of his official duties, are fixed by law, it follows, upon well established principles, that the appellant was not entitled to the reward sued for in this case. * * * It is also against public policy, and illegal, for a sheriff to receive for services, for which fixed compensation is prescribed by law, any other or further fees, although extraordinary diligence may have been exercised by him in

the discharge of his duty. (*Pool v. City of Boston*, 5 Cush. 219; Murfree on Sheriffs, sec. 1070.) A promise to pay an officer a reward for doing what it is his duty to do under the law is a promise without consideration to support it."

It is obvious from the foregoing that it is unimportant "as to the form in which this reward is worded." And it necessarily follows that no legal responsibility whatever could be assumed by the Police Department on account of the posting of such offers of reward. The responsibilities and the duties of the department and each member thereof are fully defined by the common law, statute and ordinance, and no such offer of reward, even if approved as suggested in the communication, can lawfully operate to affect this responsibility or to enlarge or modify the duties of the officers as already imposed by law.

This does not mean, however, that such offers of reward may not be recognized at all. They constitute a legal offer and would result in a valid contract obligation as between the company making the offer and civilians performing the acts sought. Such offers of reward would also be binding upon the company in cases where the services were rendered by officers themselves, who at the time of performing the acts were under no official duty to do so, or were acting entirely outside the scope or line of duty of their office. Page on Contracts, sec. 586; 34 Cyc. 1752, and cases cited.

We think the proposal here submitted to the Commissioner of Police for approval may properly be carried out with the co-operation of the Police Department according to the letter and spirit of the A. & P. Company's communication. The proposal is so worded as to make possible its acknowledgment as a generous gratuity to be made by the company solely at its option in the various

cases mentioned, and in each case upon the express condition as therein stated that "the above rewards (are) to be paid after each case has been investigated and recommendations approved by the Chief Commissioner of Police of the City of Chicago." In this way the proposed plan could operate as a legitimate and laudable means to the desired ends of law enforcement and crime prevention.

A reply to this communication that the written plan of rewards submitted to the Department of Police has been received and placed on file, and that the same will receive the approval and co-operation of the department to the fullest extent allowed by law, will be quite in conformity with the law and the ethics involved.

(No. 6356—January 25, 1929—F. J. C.)

1 BUILDINGS, PERMIT, DISCRETION.

The Commissioner of Buildings may exercise his discretion in issuing a permit for a building to be erected as a hotel with a public garage upon land which although in an apartment district is valueless for apartment purposes and with reference to which the Board of Appeals would grant a variation if the matter was presented to it.

2 ZONING, COMMERCIAL USE, EXTENSION OF.

The commercial use of premises in an apartment district will not be extended where such extension would amount to an encroachment upon the apartment district, except where the commercial use is sought with reference to a small strip of land which is so situated as to make it practically valueless for apartment purposes.

Hon. Christian P. Paschen, Commissioner of Buildings:

We have your letter of recent date requesting an opinion as to the application made for a permit to erect a building at 2551-65 North Clark street, this building to be erected as a hotel with a public garage on the rear of a lot, as is indicated on the survey plat which accompanies your letter.

We have had a plat made by the Map Department showing the layout of the land in this particular block. The block is irregular in shape and is located on the east side of North Clark street between Wrightwood avenue and Deming place and extends eastwardly from North Clark street to Hampden court. The north boundary of Lot 1 extends 268.87 feet to a sixteen-foot alley to the east of the premises in question. This alley intersects an alley running east and west from a point 153.5 feet east of Clark street to Hampden court. The alley which is intersected is contiguous to the north boundary of Lot 1 at a point 153.5 feet east of Clark street and extends to the

rear lot line of Lot 1. There is another alley sixteen feet wide running south from Wrightwood avenue to the north line of Lot 1 of the premises in question. **This alley from Wrightwood avenue to the intersecting alley is 149.91 feet.** The alley to the east of the premises extends from a point at the north line of Lot 1 to the south line of Lot 4. Two of these alleys are 16 feet wide and one is 15 feet wide. The street line on North Clark street from a point at the northwest corner of Lot 1 to the street line of Wrightwood avenue extends in a diagonal direction to the northwest for approximately 165.2 feet. This diagonal line is caused by the jog in North Clark street where it intersects with Wrightwood avenue. Wrightwood avenue comes into Clark street on the west side of Clark street at approximately 100 feet south of the point where Wrightwood avenue extends east from Clark street. In other words, Wrightwood avenue does not extend in a straight line through North Clark street but the intersection on the south side of Wrightwood avenue and Clark street faces almost directly opposite Lot 1 of the premises in question, while the part that extends east from Clark street is approximately 100 feet north of the south intersection of Clark street and Wrightwood avenue.

Map 16 of the Use Maps of the Zoning Ordinance indicates a rather peculiar situation as to the zoning uses. It indicates that Clark street from Deming place to Wrightwood avenue is zoned for commercial purposes and that the zoning on Clark street at the southeast corner of Wrightwood avenue and Clark street is commercial from the street line on the east side of Clark street to the alley which runs north and south for a distance of 149.91 feet and that south of that point on North Clark street there is no other indication as to the depth of the commercial use zone in that lot. The rest of the square bounded by

Wrightwood avenue and Deming place and Clark street and Hampden court is zoned for apartment purposes and is in a Third Volume District. The two alleys which are located at the north end of the block and the alley extending south at the east line of Lots 1, 2, 3 and 4 present a peculiar situation as to what use could be made of the property from the commercial boundary to the west side of the alley extending along the east end of the lots. If we assume that the commercial use from the point 149.91 feet on Clark street is only 125 feet wide then we must assume that the rest of the area of these lots is located in an apartment district.

We have examined the platted subdivision in the Map Department as it has application to these alleys and to these lots, and we find that these three alleys have been dedicated and used for alleys for a great many years; that the subdivision was laid out some time between 1880 and 1890. Lots 1, 2, 3 and 4 all have a depth of 268.37 feet from Clark street to the alley running north and south intersecting with the alley running east and west. We have had occasion to construe the sections of the ordinance which have application to the use of commercial premises adjacent and contiguous to apartment uses. We have held adversely to the extension of a commercial use into an apartment district where such an extension would, in fact, amount to an encroachment of a commercial use into an apartment use district. We think that this matter presents a peculiar situation by reason of the fact that if a strict application of the provisions of the ordinance was invoked, that there would be a strip of land approximately 118 feet in width, access to which would be limited to the two alleys, one running north and south and the other running east and west leaving it practically valueless for apartment purposes.

We think the matter is one, that if presented to the Board of Appeals that it would justify it allowing a variation of the strict provisions of the zoning regulations granting the applicant a permit to erect the building for which he has made application to you. In the exercise of your discretion, under the circumstances, we believe that if you issue the permit your decision would not be disturbed either by the Board of Appeals or by the courts. As the administrative officer of the ordinance we think you would be exercising sound discretion in issuing this permit.

Without desiring to establish any precedent and passing only on the question involved in this case, we think that if in your discretion you believe that the spirit of the ordinance will be observed, then under paragraphs A, B, C and D of section 23 of the Zoning Ordinance referred to by you, you will be justified in issuing this permit. Paragraph A of section 23 provides as follows:

“Whenever a portion of any district is indicated upon the use for volume district map as a strip paralleling an opened or unopened street, the width of this strip, *unless delimited on the map by dimensions, lot lines, alleys, railroad or elevated rights of way, or otherwise, shall be assumed to be 125 feet* measured at right angles from the nearest street line of the street to which it is parallel and adjacent.”

It will be seen that the designation as a commercial use is not delimited on the map in any way, yet it can be seen from the plat that these lots are of unusual depth and that the lots themselves are bounded by the alley to the east. If the lots in question were in one ownership at the time of the passage of the ordinance, and we assume that they were from the type and character of the buildings on them, then the commercial use on North Clark street could be extended to a point 25 feet beyond

the 125 feet commercial use, in the exercise of the discretion of the Board of Appeals upon a hearing for a variation, and we have no doubt that if the matter was presented to the Board of Appeals they would grant this variation. This would entail some delay on the part of the applicant to obtain his permit for this building which we think would be unnecessary.

We are therefore of the opinion that if in your discretion you issue the permit to the applicant in this matter, that such discretion would be reasonable, and you will find your justification for so doing under the terms of the ordinance and under the peculiar conditions as they exist in this particular case.

(No. 6357—January 26, 1929—L. H.)

1 ANNEXED TERRITORY, REVENUE, COLLECTION AND APPLICATION.

Moneys collected by town and county collectors in territory annexed under the Act of 1872 should be turned over to the City whose officers are then responsible for the proper application of such moneys.

2 ANNEXED TERRITORY, REVENUE, ACCOUNTING.

In case township and school district officers in territory annexed to the City of Chicago under the Act of 1872 refuse to turn over moneys collected by them to the City, the only course under the present law is to demand an accounting for the funds received by these officers first by notice and then by bill in chancery.

3 COMPTROLLER, ANNEXED TERRITORY.

It is the duty of the Comptroller to demand of the county collector that all moneys collected from taxes for municipal and school purposes in annexed territory to be paid to the City of Chicago and to see that a proper accounting and application of these funds are made.

4 ANNEXATION ACT OF 1872, REVENUE.

Revenue collected in territory annexed under the Act of 1872 should be adjusted in conformity to the Act of 1889, although the Act of 1872 makes no express provision for the same.

Hon. George K. Schmidt, City Comptroller:

We are in receipt of your letter of the 25th instant in which you enclosed copy of a statement from the County Collector showing that certain taxes collected from certain annexed territory in the Town of Leyden for City and school purposes have been turned over to the Supervisor of the Town of Leyden and to the Treasurer of School District No. 80, instead of being paid to the City of Chicago. You ask whether you should allow the ac-

count to rest this way or should demand that the Town of Leyden and the School District involved should remit the money thus received to the City of Chicago.

There are two statutes under which annexations may be effected. One is the Act of 1889, which is designed to provide for the annexation of cities, incorporated towns and villages, or parts of same. The Act of 1872, on the other hand, is designed primarily for the annexation of unincorporated territory, although by reason of recent amendments it may be invoked for purposes of annexing incorporated territory. The annexation here involved was made under the Act of 1872, and the territory before annexation was unincorporated.

The Act of 1889 very fully and precisely defines the procedure and the method of handling the finances involved, both as to the general funds and the school funds. It makes provision for the debts of the annexed district, the funds on hand, taxes in process of collection, levies of taxes not yet completed, special assessments, school property, etc. Hence, if this had been an annexation of incorporated territory under the Act of 1889, there could be no departure from the exact method of procedure outlined in the Act. On the other hand, the Act of 1872 does not outline the procedure with respect to property and funds or taxes in process of collection, so far as unincorporated territory is concerned. In section 3 of this Act, which was passed in 1913, provision is made for disconnecting territory from one corporation and annexing it to another corporation. In this section provision is made for the adjustment of property rights and finances in such cases, the language of the statute being as follows:

“Provided, further, that all property rights and questions of indebtedness and tax matters between the municipalities affected, or such territory, shall be adjusted in accordance with the provisions of an Act

entitled 'An Act to provide for the annexation of cities, incorporated towns and villages, or parts of same, to cities, incorporated towns and villages,' approved and in force April 25, 1889, as amended by an Act approved June 5, 1911, in force July 1, 1911."

While the provision just quoted seems to apply only in cases where a part of another corporation is annexed, it has been our practice to apply it in the case of unincorporated territory, when annexed to the City. Our reason for doing so is because no other method is provided by statute, and the method thus adopted seems reasonable, just and practicable. Our recommendation is that this adjustment should be made in conformity with the Act of 1889 if possible. If that Act is followed the monies collected by the town and county collectors must be turned over to the City, and the City's officers would be responsible for the proper application of same. But if the officers of the township and the school district in question decline to follow the procedure outlined in the Act of 1889, we do not think there is any authority or precedent under which we can compel them to do so. Under these conditions your only course is to demand an accounting of the funds received by these officers, and if there is ground for assuming that they have not been fully accounted for, or that they have been misapplied, the proper thing to do is to submit the controversy to a court of equity. There is a provision of the Act of 1889 (section 13) which requires that all matters in dispute at the end of sixty days after annexation shall be submitted to the Circuit or County Court, which court "shall hear and determine all matters so in dispute and give judgment or decree as the right of the matter may demand."

Our experience in such controversies has been that the courts adopt a liberal view of the statutes and construe them together so that the provisions in the one are ap-

plicable to an annexation under the other when justice requires it.

Your duty in the premises is to see that a proper accounting and a proper application of the funds already turned over is made, and to demand of the County Collector that all moneys collected from the taxes for municipal and school purposes in the future should be paid to the City of Chicago. The Department of Law sent notice to that effect to the County Collector at the time annexation became effective, but the notice seems to have been ignored. Another notice should be sent by you.

(No. 6358—January 27, 1929—L. B. E., F. J. C.)

STREETS, GIRDERS OR COLUMNS, REMOVAL OR RELOCATION.

The Illinois Commerce Commission and not the City Council has power and jurisdiction to order the removal or relocation of girders or columns at public street intersections by corporations organized under the General Railroads Act.

To the Honorable, the City Council of the City of Chicago:

We note that recently the City Council passed the following order:

“Ordered, That the Corporation Counsel be and he is hereby directed to submit to the City Council at its next regular meeting an opinion as to the power of the City of Chicago to cause the Chicago Rapid Transit Company to move girders (columns) in North Western avenue under the tracks of the Ravenswood Branch, back to the curb line; so that said girders (columns) may not be an impediment to traffic.”

This opinion will not consider the question of whether said girders constitute an impediment to traffic and as to when an impediment to traffic is a nuisance, because both of these questions would involve a discussion of the merits and demerits not only of girders and columns, but of safety islands, safety lanes and many other similar obstructions to traffic which exist in our public streets. These questions are largely questions of fact which should be decided by a court of law after an investigation of all the facts and circumstances in each case.

If these columns at the present time are in fact such an impediment to street traffic as to cause the users of the street to be subjected to much danger they would constitute a nuisance which should be abated by the City through proper court proceedings.

When these columns were erected we will assume they did not constitute a nuisance. (*Doane v. Lake Street Elevated Railroad Company*, 165 Ill. 510.) Changing modes of travel, however, and other changes in the habits and customs of the public may cause such columns which were not nuisances when erected, to become nuisances.

Stern v. International Railway Company et al., 220 N. Y. 284, 115 N. E. 759 was a case where trolley poles were placed in the middle of the street between two street car tracks, in the City of Buffalo, New York. In 1912 a man was riding in an automobile and in attempting to pass a car ahead of him, the car collided with a trolley pole and he was killed. His administratrix brought action for damages against the City of Buffalo and the Railway Company, jointly. In discussing the question of nuisance the court used the following language:

“(3) The question is whether the place chosen is so dangerous and the danger so needless that the choice becomes unreasonable. If danger in that de-

gree is present, both the Railway Company and the City are charged with liability. The railway company is liable, because the poles are then a nuisance. *Lambert v. Westchester El. R. R. Co.*, *supra*; *Cleveland v. Bangor Street Ry. Co.*, *supra*. The city is liable because the nuisance is not abated. *McKim v. Philadelphia*, *supra*; *Ring v. City of Cohoes*, 77 N. Y. 83, 88, 33 Am. Rep. 574.

“(4) The question, therefore, is whether there is any evidence that in April, 1912, when the accident occurred, the location of these poles was dangerous, and that the danger was unreasonable. When the road was first electrified in 1889, there were, comparatively speaking, but few trolley lines in this state. We may assume without deciding that the choice of center poles, rather than side poles, even though unwise, was, in those conditions and at that time, an error of judgment and no more. But in the years that have followed conditions have changed. The use of trolleys has become almost universal; the center poles have been supplanted generally, though not everywhere, by side poles, placed upon the sidewalk; the automobile has changed the ancient modes of travel, and magnified the likelihood and dangers of collision. We think the jury had the right to find that with these changes the center poles have become a menace to the traveler. That they were a menace in other parts of Main street the common council had itself resolved. It announced that judgment in 1909 and again in 1912. In each year the railway company received the resolution, and obeyed it. We do not overlook the suggestion that there was a difference of conditions. Main street at the points of change was narrower, it is said, than at the scene of the collision. Its width was 40 feet instead of 50. At the time of the resolutions, however, an order had been made to widen it. Evidently the center poles were still felt to be a source of danger. There was also a difference, it is said, in the character of the neighborhood. One section was devoted to business, the other in the main to residences. But even in the residence section business had gained a foothold. We think that conditions, even though not identical, were similar to such an extent as to make the change of some significance. But aside from

any, admission implied in the defendant's conduct, the very location of the poles gives room for conflicting inferences. Plainly, there was at least some risk of accident; plainly, the risk was needless, whatever its degree; plainly, therefore, the inference of fault may be drawn unless the risk was so remote or trifling that reasonable men in the exercise of reasonable care, would not have striven to avoid it. In the light of all the circumstances, we think that question was for the jury. We have the express admission of the city, 3 years before the accident, that in another section of the same street the poles had become a danger to public traffic. We have the railway's submission to the order, which found its justification in the danger. *Wigmore on Ev.*, Sec. 282; *Stevens v. Boston El. R. R. Co.*, 184 Mass. 476, 478, 69 N. E. 338; *C. & A. R. R. Co. v. Eaton*, 194 Ill. 441, 62 N. E. 784, 88 Am. St. Rep. 161. We have the general disuse of center poles in other cities, except where grassplots or other spaces in the center of the street serve to subdivide the highway. And, finally, we have the growth in traffic during 20 years; the change in methods of locomotion, the added chances and dangers of collision, and the need, obvious without evidence, of freeing the space between curb and curb from obstructions which could be made without risk to serve their purpose elsewhere. We place our judgment, not on any of these circumstances singly, but on all of them collectively. Their cumulative weight, we think, makes possible the inference that the center poles had become dangerous, and that the danger was unreasonable. That the city had no record in its claims department of any similar collision is not decisive. It was none the less alive to the danger. This is attested by the resolution of its common council. Whether claims had been made against the railway company, we do not know. It gave no evidence on the subject, and neither gains nor loses by its silence."

Further on the court says:

"(5) These poles were not a municipal improvement. They were not planned and placed by the city. They were planned and placed by the railway. If their location was dangerous, and the danger was

needless, they violated the implied condition of the franchise, and were in the highway without right. They were no more a municipal improvement than defective rails or slots. *Schild v. C., P., N. & E. R. R. Co.*, 133 N. Y. 446, 31 N. E. 327, 28 Am. St. Rep. 658; *Brown v. Met. St. Ry. Co.*, 60 App. Div. 184, 70 N. Y. Supp. 40; *id.*, 171 N. Y. 699, 64 N. E. 1119; *Worster v. Forty-Second Street & G. St. F. R. R. Co.*, 50 N. Y. 203.

“(6, 7) The municipal improvement was the street, which had long ago been opened. While it remained open, the duty of the city was to see that it was kept clear of dangerous and unnecessary obstructions which with reasonable care could be discovered and avoided. Error of judgment alone does not carry liability with it, for error of judgment alone is consistent with reasonable care. But failure to abate dangers which reasonable care would have revealed will charge the city with liability, and this whether the form of action be negligence or nuisance. *Trustees of Canadaigua v. Foster*, 156 N. Y. 354, 50 N. E. 971, 41 L. R. A. 554, 66 Am. St. Rep. 575; *Uggla v. Brokaw*, 117 App. Div. 586, 591, 102 N. Y. Supp. 857. ‘It cannot be held as a general proposition that a city may excuse itself from a charge of negligence as to the condition and care of its streets, merely by claiming that it had acted judicially in determining to leave the street in a dangerous condition for public travel.’ Williams, J., in *Kiernan v. Mayor, etc., of N. Y.*, 14 App. Div. 156, 159, 43 N. Y. Supp. 538, 541.

“Reliance is placed upon rulings that stepping stones, hitching posts, hydrants, shade trees, and the like are legitimate obstructions. *Robert v. Powell*, 168 N. Y. 411, 61 N. E. 699, 55 L. R. A. 775, 85 Am. St. Rep. 673; *Dubois v. City of Kingston*, 102 N. Y. 219, 6 N. E. 273, 55 Am. Rep. 804; *Wolff v. Dist. of Columbia*, 196 U. S. 152, 25 Sup. Ct. Rep. 198, 49 L. Ed. 426, 1 Ann. Cas. 907; *Ring v. City of Cohoes*, 77 N. Y. 83, 33 Am. Rep. 574; *Dougherty v. Village of Horseheads*, 159 N. Y. 154, 53 N. E. 799; *Jordan v. City of New York*, 44 App. Div. 149, 60 N. Y. Supp. 696; *id.*, 165 N. Y. 657, 59 N. E. 1124; *City of Wellington v. Gregson*, 31 Kan. 99, 103, 1 Pac. 253, 47 Am. Rep. 482; approved in *Dougherty v. Village of*

Horseheads, 159 N. Y. 154, 161, 53 N. E. 799. In some cases, as Brewer, J., points out in *City of Wellington v. Gregson*, *supra*, the courts dealt with the question as one of fact for a jury, citing 2 Dillon on Munc. Corp., Sec. 1016. In other cases, exhibiting other conditions, they dealt with it as one of law. Always, however, the ruling was made, not absolutely, but relatively, to particular conditions of location, of convenience, or of necessity. We had occasion in *Lambert v. Westchester El. R. R. Co.*, 191 N. Y. 248, 252, 83 N. E. 977, to emphasize that truth. There the cases that deal with stepping stones and the like were cited to exempt a street railroad from liability, for so placing one of its trolley poles as to imperil the use of the highway. We put aside the citations as inapplicable, and held that the defendant's franchise did not authorize it to place its poles where they would 'unduly and unnecessarily interfere' with the public right of travel. 191 N. Y. at page 252, 83 N. E. at page 978.

"(8) The point is made that if the center poles were safe when first erected, the city could not compel them to be moved, though they later became dangerous. We are referred to our decision in *People ex rel. C. of New York v. N. Y. Railways Co.*, 217 N. Y. 310, 317, 112 N. E. 49, but we think it is inapplicable. There the attempt was made to compel a relocation of the tracks; and the location of the tracks was held to be of the substance of the franchise. The state might relocate them in the exercise of the police power, but not the municipality. Here the things to be moved are mere incidents or appurtenances; they do not affect the location of the right of way; and wherever they are placed, the franchise in its substance remains intact. This was recognized in *People ex rel. City of New York v. N. Y. Railways Co.*, *supra*. Judge Collins said:

'The rights of a railroad corporation upon the parts of the streets appropriated to its use must be so exercised that the free use of the streets, for the purposes and in the modes inherent in their creation, will not be unreasonably interfered with. It is a part of the regulative power of the local authorities to secure such result.' "

In the case of *People ex rel. City of Chicago v. The Chicago City Railway Company*, 324 Ill. 618, the court in a well considered opinion said, on page 621:

“The license under which the railway company constructs, maintains and operates its railroad was granted and accepted subject to a reserved police power on the part of the city to regulate the use and enjoyment by the railway company of the street in such manner as the public convenience or safety at any time might require. (*Louisville Bridge Co. v. United States*, 242 U. S. 409, 37 Sup. Ct. 158; *People v. New York Railways Co.*, 217 N. Y. 310, 112 N. E. 49; *People v. Geneva, W., S. F. & C. L. Traction Co.*, 112 App. Div. 581, 98 N. Y. Supp. 719; *Pittsburgh, Cincinnati, Chicago and St. Louis Railway Co. v. Chicago City Railway Co.*, 224 Ill. App. 380.) The permission given a railway company to use the streets of a city is in subordination to the general power of the municipality over its streets. The city is under no obligation to conform its treatment of its streets to the construction of the company’s road-bed, but, on the contrary, the company must conform the construction of its road-bed to such reasonable regulations as are made by the municipality in the reasonable exercise of its powers concerning the use, control, regulation and improvement of its streets. Street railways occupy public streets subject to the use of such streets by the public, subject to such burdens as may be made necessary by reason of the improvement of such streets and subject to such changes in the construction of road-beds as improved and changed conditions may demand. (*City of Detroit v. Fort Wayne and Elmwood Railway Co.*, 90 Mich. 646, 51 N. W. 688.) The power to enact police regulations operated on all alike. This fundamental principle is incident to and part of government itself, and need not be expressly reserved when rights or property is granted to individuals or corporate bodies. They take subservient to this power. (*Ohio and Mississippi Railroad Co. v. McClelland*, 25 Ill. 123.) The police power of a State embraces regulations designed to promote the public convenience as well as regulations designed to promote the public health, morals and

safety. *Chicago, Burlington and Quincy Railway Co. v. Illinois*, 200 U. S. 561, 26 Sup. Ct. Rep. 341."

On page 622, the court said:

"The power of the city to protect the public in the use of its streets cannot be abrogated by ordinance or relinquished by contract."

On page 624, the court said:

"A review of the authorities shows that they are in harmony in holding that a municipality cannot surrender its power to control and regulate its streets, and that it is not liable to companies having a right by ordinance to place their appliances in the streets for expenses incurred in readjusting their appliances to meet conditions created by the municipality in making public improvements to promote the public convenience and necessity, when made in a reasonable manner. It is also uniformly held that the municipality, in causing such expenses, does not infringe the constitutional provision against the taking of property without compensation and the impairment of contracts, nor does it constitute a denial of due process of law."

It will be observed, however, that the case last cited related to a street railway located in the streets of the city, while the case now before us relates to a railroad organized under the General Railroads Act which railroad was situated principally upon its own privately owned right-of-way, but crossing Western avenue at the location in question.

This distinction is important because the Public Utilities Act has expressly conferred upon the Illinois Commerce Commission broad powers and control over the intersection of railroads in public streets. Section 57 of the Public Utilities Act of 1921 reads in part as follows:

"The Commission shall also have power by its order to require the reconstruction, alteration, relocation or improvement of any crossing (including the necessary

highway approaches thereto) of any railroad across any highway or public road, whether such crossing be at grade or by overhead structure or by subway, whenever the Commission finds after a hearing that such reconstruction, alteration, relocation or improvement is necessary to preserve or promote the safety of the public or of the employees or passengers of such railroad. By its original order or supplemental orders in such case, the Commission may direct such reconstruction, alteration, relocation or improvement to be made in such manner and upon such terms and conditions as may be reasonable and necessary and may apportion the cost of such reconstruction, alteration, relocation or improvement between the railroad company or companies and other public utilities affected, or between such company or companies and other public utilities and the State, county, municipality, or other public authority in interest. The cost to be so apportioned shall include the cost of changes or alterations in the equipment of other public utilities affected as well as the cost of the relocation, diversion or establishment of any public highway, made necessary by such reconstruction, alteration, relocation or improvement of said crossing."

It is manifest that from the section above quoted the Illinois Commerce Commission has broad and ample power to compel the Elevated Railroad Company to remove its girders or columns at public street intersections like the one in question. And if the Illinois Commerce Commission has this power then it follows that such a power is exclusive and cannot be exercised concurrently by a municipality.

It was held by the Supreme Court in the case of *Village of Atwood v. C., I. & W. R. R. Co.* (1925), 316 Ill. 425, where the court held that the above power over street intersections conferred upon the Illinois Commerce Commission was inconsistent with and therefore took away from cities and villages the power theretofore exercised

by them to compel railroads to keep flagmen at street intersections. The court added:

“The General Assembly by sub-section 27 of section 1 of article 5 of the Cities and Villages Act, effective July 1, 1872, vested in cities and villages organized under that act the power, among others, to require railroad companies to keep flagmen at railroad crossings of streets. This was a delegation to the municipalities designated, of a portion of the police power of the State. The police power is an attribute of sovereignty and is primarily vested in the General Assembly, which has the right at any time to recall it from the agency to which it has been delegated, and after being recalled to retain it or to confer it upon some other agency of government. In the exercise of this power the State may intervene whenever the public interests demand such interference, and in this respect a large discretion is necessarily vested in the legislature to determine not only what the interests of the public require but what measures are necessary for the protection of such interests. (*Durand v. Dyson*, 271 Ill. 382; *Illinois Central Railroad Co. v. Wilenborg*, 117 *id.* 203; *City of Chicago v. O’Connell*, 278 *id.* 591.) The General Assembly, in its discretion, withdrew from cities and villages the power here sought to be exercised by the appellant and vested it in the Commerce Commission, another agency of government.”

We believe that the *Atwood* case is conclusive of the question involved in the present case and regret to say that in our opinion the power to compel the railroad company to relocate the girders or columns at street intersections has been taken away from the City by the Legislature of this State and vested in the Illinois Commerce Commission.

(No. 6359—January 31, 1929—F. J. V.)

1 CIVIL SERVICE, REINSTATEMENT, BACK SALARY.

A civil service employee is entitled to immediate reinstatement in his former position or office upon the quashing by a court of the record of the Civil Service Commission which dismissed him from the service; and such employee is thereupon entitled to salary from the date of the judgment until the determination of an appeal from the same restoring him to such position, but he is not entitled to back salary from the time of his discharge from service by the Civil Service Commission.

2 CIVIL SERVICE EMPLOYEE, DISCHARGE, BACK SALARY, ACTION.

Until a discharged civil service employee has been restored to his office or position through an action of certiorari or mandamus, he is not in a position to sue for back salary.

3 CIVIL SERVICE, VACANCY, APPOINTMENT.

The discharge of a civil service employee by order of the Civil Service Commission creates a vacancy which the Commission may fill.

Hon. Albert W. Goodrich, Fire Commissioner, also Thomas J. Houston, Archibald J. Carey, Edward J. Denmark, Civil Service Commissioners:

Separate demands served upon the Fire Commissioner and Civil Service Commissioners in behalf of John W. Horgan have been submitted to the Law Department with request for an opinion and direction in the matter. One opinion will suffice for both the Fire Commissioner and the Civil Service Commissioners.

These demands grew out of the recent judgment of the Superior Court of Cook County which quashed the record of the Civil Service Commission which discharged the said John W. Horgan from his civil service position as fireman

in the City of Chicago. They may be divided into two parts for proper disposition, namely: (1) The demand for the immediate reinstatement of the discharged fireman to his former position in the civil service and his salary as such reinstated fireman from the date of said judgment, to wit, December 11, 1928; (2) and the demand for back salary from the date of October 22, 1922, the time of his discharge from service by the Civil Service Commission.

The right of the claimant to reinstatement in the active service in his former position of fireman, together with the right to the current salary from the date of said judgment, December 11, 1928, must be conceded and the demand therefor complied with. This is squarely decided by the Supreme Court in the case of *People ex rel. McDonnell v. Thompson et al.*, 316 Ill. 11. That was a case where the relator was discharged from his position in the Fire Department of the City of Chicago upon a hearing had on charges before the Civil Service Commission. In that case, as in the case here presented, certiorari was instituted and the discharged fireman was reinstated upon a judgment quashing the Civil Service Commissioners' record of discharge. Thereafter, in a mandamus action brought in the Supreme Court of the State to compel his reinstatement to his former position, and the payment to him of the salary, the Supreme Court sustained his petition, and awarded the writ. The judgment in that case was for the salary of the relator from the date of the Circuit Court's judgment in the certiorari proceedings. This decision is a recent one, and fully sustains the first demand for reinstatement to the position and the salary of the position from the date of the Superior Court's judgment, quashing the Commissioners' record of discharge.

(2) As to that portion of the demand which is for back salary of the claimant from the time of his discharge by

the Civil Service Commission to the date of the Superior Court's judgment, quashing the record, the claimant's demand is premature, for his right of action for such back salary has not yet accrued, and such action will not accrue until the disposition of the appeal from the Superior Court's judgment quashing the Commissioners' record which is now pending in the Appellate Court. Should such appeal result in a reversal of the Superior Court's judgment, it will operate to reinstate the Civil Service Commission's record of discharge, and, of course, will be decisive against his claim for such back salary.

A discharged civil service employee may not sue for the salary of an office or position until he has, by some direct action as certiorari or mandamus, been restored to such office or position, for the reason that during the time for which he seeks to recover salary, such salary may have been paid to another who performed the duties of the office or position. *Kenyon v. City of Chicago*, 135 Ill. App. 227; *Bullis v. City of Chicago*, 235 Ill. 472; *People ex rel. v. Burdette*, 287 Ill. 124.

The demand for back salary cannot be recognized at this time for the reason that the City may have a valid defense to the reinstated employee's action for the recovery of such back salary. Payment of this salary may have been made to another appointed to the claimant's position after his discharge from the service, and it reasonably was held by the Supreme Court that payment of the salary of a position to a *de facto* employee is a good defense to an action brought by the *de jure* holder of the position after his reinstatement by the courts. *Hittle v. City of Chicago*, 327 Ill. 443; *O'Connor v. City of Chicago*, 327 Ill. 586.

As held by the court in the case of *People ex rel. McDonnell v. Thompson et al.*, 316 Ill. 11, judgment in cer-

tiorari which quashes the record of the Civil Service Commission is self-executing and operates of its own force to reinstate the civil service employee to his former status, but it does not determine such employee's right to salary for the period of his suspension and discharge under the Civil Service Commissioners' order. Full faith and credit may be given such order so long as it is not quashed and set aside by the courts. The public service and its regular administration are so far paramount to the private rights even of a civil service employee, that upon such employee's discharge by the Civil Service Commission, another may be lawfully appointed in his stead. Indeed the appointment to fill the vacancy thus created is made mandatory by the provisions of the Civil Service Act. *People ex rel. Roderick v. City of Chicago*, 283 Ill. 462; *People ex rel. Waters v. Finn et al.*, 241 Ill. App. 621.

So long, therefore, as the record of the Civil Service Commission stands, the City may lawfully pay salary of such position to the appointee who actually fills the position and renders the service. And this is so, although the court may subsequently decide that such employee's discharge was wrongful, and that therefore he continued to be the *de jure* officer, while the appointee in his stead was merely an officer *de facto*. And in such case, as we have seen, the *de jure* officer cannot recover such salary.

According to the decision in the case of *People ex rel. McDonnell v. Thompson*, *supra*, the Superior Court's judgment quashing the Commission's record supersedes that record and entitles the claimant to immediate reinstatement to the position from which he was discharged, together with the salary of such position from the date of such judgment until the decision on appeal to the Appellate or Supreme Court. The claimant in this case, therefore, should be restored to his position in the Fire De-

partment, and his place on the payroll until the determination of the appeal taken from the judgment restoring him to such position. But the additional demand for back salary must, at this time, be denied.

(No. 6360—February 5, 1929—F. J. V.)

1 CIVIL SERVICE, PROBATIONER, STATUS.

An appointee retains the status of a probationer until the expiration of the full period of six months, and this period need not be continuous.

2 CIVIL SERVICE, PROBATIONER, REINSTATEMENT OR REAPPOINTMENT.

One who has resigned on account of illness in the family while on probation preliminary to permanent appointment under civil service is entitled to reinstatement and reappointment to his former position or office if there is a vacancy; and if there is no vacancy he must wait for certification and appointment to the first vacancy in his position that arises.

Hon. Wm. F. Russell, Fire Commissioner:

We have your communication of the 1st instant stating that Thomas F. Kelly has applied for reinstatement as patrolman in Police Department; that he was appointed and served as a probationary from July 6, 1928, and resigned July 21st on account of the poor health of his wife; that he was, at the time of his resignation, attending the Police Instruction School and had a clear record.

As to the status of a probationer the Civil Service Act, section 10, on the subject of "Appointment to Classified Service" contains this provision:

“The appointing officer shall notify said commission of each position to be filled separately, and shall fill such place by the appointment of the person certified to him by said commission therefor, which appointment shall be on probation for a period to be fixed by said rules. * . * . At or before the expiration of the period of probation the head of the department or office in which the candidate is employed may, by and with the consent of said commission, discharge him upon assigning in writing his reason therefor to said commission. If he is not then discharged his appointment shall be deemed complete.”

Section 5 of the Rules of the Civil Service Commission on this subject-matter provides the following:

“Probation. Original appointment shall be on probation for a period of six months. In no case shall a probationer be discharged until after the appointing officer has received from the commission a notice in writing that the commission has approved such discharge. Time served on probation, whether continuous or not, shall be credited upon the period of probation.”

As Mr. Kelly has not served the full period of six months since his appointment as patrolman, he retains the status of a probationer and can not be considered as having entered the civil service. The Rule of the Civil Service Commission specifically provides that the probationary period of six months' service need not be continuous. Therefore, Mr. Kelly, upon reinstatement, or more properly speaking, upon another appointment, and service thereafter for the remaining portion of his six months' probationary period, would become a fully accredited civil service patrolman in the Department of Police of the City of Chicago.

We assume that upon Mr. Kelly's so-called resignation his name was restored to the eligible list for the patrolman's position at the place where his name appeared at

the time of his appointment; or that his name was placed on a reinstatement list. In either case he would be entitled to reinstatement or reappointment to his position of patrolman providing there exists a vacancy in such position to be filled. If such vacancy exists we know of no legal obstacle in the way of his reinstatement for which he now applies. But no civil service patrolman or eligible since duly appointed may be displaced to make way for Mr. Kelly's reinstatement. In brief, if a vacancy exists, he may be immediately reinstated as a probationary patrolman, but if there is no such vacancy then he must wait for certification and appointment to the first vacancy in the position of patrolman that may arise.

(No. 6361—February 7, 1929—C. E. L.)

GASOLINE TANK, PERMIT TO INSTALL, EXTENSION.

A permit for the installation of a gasoline tank issued under the ordinance creating the Bureau of Fire Prevention to be exercised within 90 days may be extended to any other reasonable period at the discretion of said Bureau.

Hon. A. W. Goodrich, Fire Commissioner:

You inquire as to whether or not permit No. 15391 for the installation of gasoline tanks at 549-551 Roosevelt Road may be extended. This permit contains the following provision: "Tanks shall be installed within 90 days, otherwise this permit shall become null and void."

In reply thereto you are advised that chapter XLI of the Chicago Municipal Code of 1922, provides no time

limit within which such tanks are to be installed after the permit has been issued. The provision in question has, therefore, we assume, been inserted in the permit under the general provisions of the ordinance creating the Bureau of Fire Prevention and prescribing its functions.

The limitation having been imposed through the exercise of the discretion of your Bureau, it is my opinion that the permit may be extended within the reasonable discretion of the Bureau of Fire Prevention.

(No. 6362—February 11, 1929—L. H.)

TAX ANTICIPATION WARRANTS, DUE DATE.

Under the General Warrants Act as well as by virtue of the School Act a due date may be inserted in tax anticipation warrants provided such date is fixed within a time the taxes against which the anticipation warrants are drawn shall have been collected, as warrants are payable only out of such taxes.

Hon. Joseph B. McDonough, Chairman, Subcommittee on City Loans and Deposits:

In a resolution passed by your Committee on February 9, 1929, you called upon the Corporation Counsel to submit a summary of the law governing due date as to principal and interest on tax anticipation warrants in cities of 500,000 or more inhabitants.

The issuance of tax anticipation warrants for the general corporate purposes of the City of Chicago is governed by the general law relating to such warrants. Those of the Board of Education are governed by a provision

in section 132 of the School Act. There are also special provisions with reference to such warrants drawn against the library taxes, certain pension fund taxes, etc. It will not be necessary for the purposes of this opinion, to take up for consideration any of these special provisions except the School Warrant Act, since the General Warrant Act and the School Warrant Act are the ones that affect the situation that confronts the Committee.

The general act relating to warrants contains the following provision:

“Warrants may be issued under this Act payable at the time fixed therein, and every warrant issued under this Act shall bear interest, payable only out of the taxes against which it shall be drawn, at the rate of six per centum per annum, from the date of its issuance until paid, or until notice shall be given, by publication in a newspaper or otherwise, that the money for its payment is available, and that it will be paid on presentation, unless a lower rate of interest shall be specified therein, in which case the interest shall be computed and paid at said lower rate.”

It will be seen from the above that the Act contemplates that a date shall be fixed in the warrant at which time it will be paid. The interest is payable at the time the principal is paid. There is no provision made for paying interest at stated periods before the principal is due, and this cannot be done, because the interest as well as the principal must be paid out of the taxes when collected. If the due date is fixed at a time when the taxes have not yet been collected, neither principal nor interest can be paid, because they are “payable only out of the taxes against which” the warrant is drawn.

Section 132 of the School Act provides as follows with respect to School Warrants:

“* * * when there is not sufficient money in the treasury to meet the ordinary and necessary expenses

for educational and for building purposes, to request the city council, whose duty thereupon it shall be, to order issued warrants against and in anticipation of any taxes levied for the payment of the expenditures for educational and for building purposes to the extent of seventy-five per cent of the total amount of the taxes levied for such purposes: Provided, however, that warrants drawn and issued under the provisions of this section shall show upon their face that they are payable solely from said taxes when collected, and not otherwise, and shall be received by any collector of taxes in payment of taxes against which they are issued, and such taxes (against) which said warrants are drawn shall be set apart and held for their payment. Every warrant issued against said taxes shall bear interest, payable annually out of the taxes against which said warrants are drawn, at a rate of not to exceed five per cent per annum, from the date of their issuance until paid, or until notice shall be given by publication in a newspaper or otherwise that the money for the payment of said warrants is available and that said warrants will be paid on presentation."

It will be seen from the last quotation that there is apparently no provision made for a due date on school warrants, but, on the other hand, interest may be paid annually. Such interest, like the principal, is payable only out of the taxes against which the warrants are issued, but the provision for annual payment may come into play where only a portion of the taxes are collected when the interest day arrives. Since there is nothing in the School Act which prohibits a due date, we are of the opinion that a due date may be affixed in accordance with the General Warrant Act with which the School Act does not conflict and which applies to warrants "drawn and issued upon the Treasurer of the State or of any county, township, city, village or other municipal corporation, or against any fund in his hands."

While there are many differences in language and in minor details, the provisions in the various states will be found substantially the same as in this State. Thus, in New York, the power to issue this class of securities is given in the most general terms, which give cities the right "to become indebted for any public or municipal purpose, and to issue therefor the obligations of the city, and to determine upon the form and the terms and conditions thereof," yet these cities are prohibited from refunding such warrants by the following provisions of paragraph 20, chapter 22 of what is known as the General City Law:

"To establish and maintain sinking funds for the liquidation of principal and interest of any indebtedness, and to provide for the refunding of any indebtedness other than certificates of indebtedness or revenue bonds issued in anticipation of the collection of taxes for amounts actually contained or to be contained in the taxes for the year, when such certificate or revenue bonds are issued or in the taxes for the next year succeeding and payable out of such taxes."

The statutes of the other states containing large cities, such as Massachusetts, Pennsylvania, Ohio, Missouri and California, contain provisions for the issuance of tax anticipation warrants or other certificates of indebtedness drawn against the taxes, and they sometimes provide like ours for fixing a date of payment thereon. This is particularly true of the eastern states, where the practice seems to prevail generally of putting a due date on such securities.

The only way in which the provisions relating to tax warrants in cities of more than 500,000 inhabitants can be summarized is through an analysis of the statutes of the various states. We have made only a general survey, since that is all that could be done in the very limited

time which your Committee gave us for this purpose. An exhaustive study could be made in a few days' time, if you deem it necessary, but, unless there are some specific questions to be considered in reference to the matter, it would not lead to any important results to make an exhaustive study of the subject.

(No. 6363—February 11, 1929—L. H.)

1 LOST PAY CHECK, BANKS, LIABILITY.

A bank which has paid a lost City pay check, although it was endorsed by the payee when lost, is liable to the City where the City Treasurer has paid the check in due course.

2 PAY CHECK, ENDORSEMENT.

The clearing house stamp of a bank on a City pay check is in effect a guarantee of all previous endorsements.

3 PAY CHECK, NATURE.

A City pay check is recognized as an ordinary check and is regarded as a negotiable instrument.

Hon. Charles S. Peterson, City Treasurer:

You referred to us the question of the liability of a bank to the City where the bank made payment on a pay check of an employee who lost it after he had endorsed it and the City Treasurer in due course paid the check.

It appears that a pay check in the usual form, dated October 24, 1928, and drawn on the Treasurer of the City of Chicago, for the sum of \$81.75, was delivered to one Guiseppi Olivetto, an employee of the City, who was en-

titled to the said sum. Olivetto lost the check after he had endorsed it. The check was afterwards endorsed by someone who signed as "Mrs. Galvani." It was presented to the Illinois Merchants Trust Company which in turn passed it through the Clearing House, by which it was turned over to the City Treasurer, who paid it in the regular course of business, but upon learning of the loss of the check by the payee, immediately made claim against the bank for the money he paid out. The Clearing House stamp is dated October 27th and the demand of the City Treasurer on the bank was made on October 29th, from which it appears that due diligence was exercised. The bank has declined to repay the City Treasurer and under date of January 5, 1929, sent the check back to the City Treasurer with the statement that "Mr. Galvani" wants the owner of the check to call on him. The letter of the bank states, among other things:

"The matter has been in our hands for investigation for some time and Mr. Frank Galvani of 624 Kedzie Avenue has been trying to locate the man for whom he cashed the check. Mr. Galvani now brings the check back to us and would prefer before taking any final action, to have the owner of the check call on him personally that he may discuss the matter with him. He feels that he is not legally responsible for a claim on this check as the owner had endorsed it and there is no question about his signature. However, he feels that in acting in consideration for the original payee, he would like to have this personal contact with him to see what might be done for the owner of the check."

The City Comptroller apparently made a further effort to collect from the bank, since he states in his letter to the City Treasurer, under date of January 9, 1929, that the owner of the check saw Mr. Galvani but received no satisfaction, and therefore the Comptroller requests that the bank should recognize the stop order placed imme-

diately after the loss of the check. There is a note on this letter saying that the bank did not know of the stop order. It is also stated in this note that the "City Treasurer has not requested them to debit the Galvani account."

While it may be that there was no specific request to debit the Galvani account, the tenor and effect of the City Treasurer's demand on the bank was the same as this.

The liability of the bank seems to be clear in this matter. Although the check does not come within the precise definition of a negotiable instrument, nevertheless these pay checks have always been treated as such so far as assigning and transferring through the banks is concerned. The banks recognize their stamp on them as having the same effect as on an ordinary check. The rule being that the Clearing House stamp of the bank is in effect a guaranty of all previous endorsements, it follows that the bank in passing this check through the Clearing House assumed liability for all previous endorsements.

Under these circumstances, the bank must make good the loss to the City and will have to seek reimbursement from the party who obtained the money on the check from the bank. We therefore advise that the bank should again be requested to pay and to charge the amount back to the previous endorser. If the bank persists in its refusal to honor such a request suit will have to be brought for the money unless it should appear that there was some feature about the transaction that we are not informed of which shifts the responsibility for the loss on the City's officers.

(No. 6364—February 13, 1929—G. F. M.)

MUNICIPAL EMPLOYEES, ORDINARY DISABILITY AND
WORKMEN'S COMPENSATION, PAYMENT.

A municipal employee who receives workmen's compensation on account of disability is not entitled to ordinary disability benefit under the Municipal Employees' Annuity and Benefit Fund Act unless the disability benefit is greater than the compensation; and where the compensation is less than the disability benefit the former must be deducted from the latter.

*Retirement Board, Municipal Employees' Annuity and
Benefit Fund:*

Replying to your request for an opinion as to when payments are to be made under section 48 of the Act, the following is submitted:

Your letter states that Mr. James F. Crowley was granted duty disability benefit from October 15, 1926, to February 1, 1928; was then granted ordinary disability benefit from February 1, 1928, to the date of the last meeting; that at the last meeting of the Retirement Board the grant of ordinary disability benefit made as of February 1, 1928, was cancelled and duty disability benefit granted, effective as of February 1, 1928; that Mr. Crowley was granted a workmen's compensation by the City in the sum of \$3,750, payable at the rate of \$14 per week until paid in full and at the expiration of this claim was entitled to a pension from the City of \$25 per month for life; that the Workmen's Compensation Bureau paid him \$1,036 up to and including March 15, 1928, at which latter date he made a settlement with the City and received a payment of \$2,570.33 which amount was paid to him

on April 12, 1928; that he received a total payment under the Workmen's Compensation Act of \$3,606.33; that there has been deducted from the disability benefits heretofore paid to him the sum of \$1,675.28 in accordance with the provisions of section 48 of the Act; that your fund now owes Mr. Crowley the sum of \$525.48 representing the difference between what was paid him as ordinary disability benefit and what was due him as duty disability benefit; and that the amount received by Mr. Crowley (by virtue of his discounting the compensation award and collecting a lump sum on April 12, 1928) exceeds the amount of disability benefits due him to date by the sum of \$1,405.57.

Your question is as to when disability payments are to be made to Mr. Crowley under section 48 of the Act.

Section 48 of the Municipal Employees' Annuity and Benefit Fund Act provides, among other things, as follows:

"If any municipal employee who shall be disabled shall receive any compensation from such city on account of such disability under and by virtue of the law known as the Workmen's Compensation Act the disability benefit herein provided for such municipal employee shall be reduced by any amount so received if such amount shall be less than the amount of such benefit; and if the amount or amounts received as compensation exceed the amount of the disability benefit herein provided for such municipal employee, such municipal employee shall not receive any such disability benefit until a period of time during which such benefit payable at the rate herein stated would equal the amount of such compensation shall have expired. In calculating any such period of time, interest upon the amounts of money involved shall not be considered."

It will be noted that the above extract from the law provides that "if the amount or amounts received as

compensation exceed the amount of disability benefit herein provided for such municipal employee, such municipal employee shall not receive any such disability benefit until a period of time during which such benefit payable at the rate herein stated would equal the amount of such compensation shall have expired."

There is no question but what the lump sum award paid to and collected by Mr. Crowley was compensation from the City of Chicago on account of disability under and by virtue of the law known as the Workmen's Compensation Act. There is also no question but what the amount he has been paid exceeds the amount of his disability benefit by the sum of \$1,405.57.

Under the provisions of the Act hereinabove quoted, it necessarily follows that your Honorable Body can not pay any disability benefit to Mr. Crowley until such time as the disability benefit to which he is entitled will have accumulated to a total sum equal to \$1,405.57 in amount.

I am of the opinion that when the disability benefit payments to which Mr. Crowley would be entitled under the Municipal Employees' Annuity and Benefit Fund Act shall have accumulated to his credit to the amount of \$1,405.57, he will thereafter become entitled to be paid his disability benefit, less the \$25 monthly pension payable to him under the award hereinabove referred to. I am further of the opinion that your Honorable Body is not empowered under the law to make any payment on account of disability benefit until the period last hereinbefore designated shall have expired.

(No. 6365—February 15, 1929—F. J. V.)

1 CIVIL SERVICE, REINSTATEMENT, SALARY WAIVER.

No salary waiver should be exacted from a civil service employee who has been reinstated unconditionally, but such waiver should be required as a condition precedent to reinstatement.

2 CIVIL SERVICE, CONTINUANCE OR REHEARING,
WAIVER.

As a condition to the granting of a continuance or a rehearing there should be obtained and made a part of the record a waiver of any right of action for back salary that the suspended employee might have for time that he has been kept out of service.

Hon. William F. Russell, Commissioner of Police:

You have submitted to us the official order of the Civil Service Commission by its secretary which directs you to obtain a salary waiver from Joseph Ervin, former patrolman, who was reinstated by the Commission. This is obviously an error in procedure. This waiver should have been exacted from the reinstated patrolman as a condition precedent to the Commission's order of reinstatement and it should have been so stated as a part of the Commission's record of reinstatement. Having been unconditionally reinstated, there is now no legal compulsion upon the reinstated patrolman to execute such waiver. Nor is there any power in the Commissioner of Police to exact such waiver as a condition of such patrolman's reinstatement, for the Commissioner has no alternative in the matter but must reassign the patrolman to his former position.

This case is analogous to the case of one on trial before the Commission who applies for continuance of the hear-

ing. Because it is provided by section 12 of the Civil Service Act that one may not be suspended for a period exceeding 30 days and such application for continuance may prolong his suspension from the service longer than such period and thereby entitle him to reinstatement and back salary, it has been the practice of the Civil Service Commission to exact as a condition of the granting of the continuance of the hearing, this waiver of any right of action that the suspended civil service employee might otherwise have. A similar record should be made upon the granting of a rehearing and an order of reinstatement and a similar waiver should be exacted by the Commission for such rehearing and reinstatement, so as to preclude any right of action for back salary that such reinstated civil service employee might otherwise bring for the time that he has been kept out of the service by reason of the original hearing and the order of the discharge thereupon entered.

We are of the opinion that in the present status of this case, it is the duty of the Civil Service Commission itself to procure a waiver here sought and make it a part of their files and their record of reinstatement.

(No. 6366—February 15, 1929—F. J. V.)

1 CIGARETTE LICENSE, VENDING MACHINE.

Cigarettes cannot be sold by means of vending machines when not operated by a person or agent.

2 CIGARETTE LICENSE, APPLICATION FOR.

An application for a cigarette license should show by whom the sale of cigarettes is to be conducted and whether the sale is to be made in conjunction with other businesses to enable the official who issues the license to determine the character and reputation of the applicant.

Hon. William F. Russell, Commissioner of Police:

We have your communication of the 13th instant submitting therewith four separate applications for licenses to sell cigarettes. You state that "the cigarettes (are), to be sold from machines owned by the Chicago Smoketeria Corporation." You ask for "an opinion as to whether or not licenses may be issued for the sale of cigarettes by the means of such machines."

The ordinance providing for licensing the sale of cigarettes is found on page 305 of the Chicago Municipal Code of 1922. Section '971 provides that:

"Any person, firm or corporation desiring a license to sell cigarettes or cigarette papers or wrappers in the city shall make written application therefor which shall conform to the general provisions of this ordinance relating to applications for licenses, and if the mayor shall be satisfied that such person or persons is or are of good character and reputation and suitable to be intrusted with the sale of cigarettes, he shall cause the city clerk to issue a license to such applicant upon the payment to the city collector of a license fee at the rate of one hundred dollars per annum * * *."

Our first observation is that these application blanks are not sufficiently made up to enable the Mayor or anyone else to pass upon them for the purposes of the foregoing section of the license ordinance. It would be impossible to determine the character and reputation of the applicant, or how and by whom the sale of cigarettes was to be conducted, or upon whose charge or responsibility such sales are to be made or whether such sales are to be made in conjunction with other businesses conducted in the same places. Of the four applications said to be those of the Chicago Smoketeria Corporation, only one is actually signed and that by means of a rubber stamp on the line for applicant's signature. No description of the Chicago Smoketeria Corporation appears nor is the residence or office location of this corporation given. It is indicated that this application, as thus made, is "by M. Bramer." What official connection with, or by what authority from the Chicago Smoketeria Corporation, "M. Bramer" assumes to act does not appear, nor does it appear from the application itself that these cigarettes are to be sold by means of any machine or machines nor is it stated that any agent or authorized person is to be in charge of the sale of cigarettes or of any machine to be operated in such sale of cigarettes for or in behalf of the Chicago Smoketeria Corporation. We must assume, therefore, from your own statement, that the sale of cigarettes under these licenses is by means of some sort of vending machine. That this assumption is correct is established by the fact that all four of these applications for licenses are made by or in behalf of the Chicago Smoketeria Corporation; also that such machines are merely to be placed on the premises indicated in the applications which are already occupied by others in the conduct of other business enterprises. So far as the applications indicate, these

machines are to do their own selling of cigarettes for the Chicago Smoketeria Corporation without any agent or responsible person in charge of such machine. In such situation there would be no one responsible for the operation of the machine, nor any real existing applicant selling cigarettes under the license. We do not believe that such a vending of cigarettes comes within the letter or spirit of the ordinance providing for the licensing of the sale of cigarettes. This ordinance certainly does not contemplate the mere placing of cigarette vending machines in the places described in the application. Certainly the applicant, or some duly authorized agent, must be in charge of and responsible for the sale of these cigarettes, even if such sales may be made by a vending machine. And this brings us to two serious questions as to the legality of the sale of cigarettes by machines.

First, whether or not the machine is a legitimate vending machine which merely provides for the purchase and sale of cigarettes by its use; second, whether there is involved in the use of the machine any gambling device operating as a part of the transaction of sale. If this license is actually based upon the fact that the sale of cigarettes is to be by means of a vending machine, a statement of such fact together with a description of the machine is an essential part of the application, and even then no license could be granted for such sale unless some person is authorized by the applicant to be in charge of and responsible for such machine.

Second, both the state law and section 975 of this license ordinance make sales of cigarettes to minors unlawful and provide penalties for their violations. Certainly no license may be granted for the sale of cigarettes in the ordinary course and method of such sales where, as

it appears in these cases, mere vending machines are to be left in the various places to which the licenses apply.

In our opinion these applications presumably made by the Chicago Smoketeria Corporation, are merely for the purpose of placing cigarette vending machines in the places designated, and not at all for the ordinary purposes contemplated by the ordinance for the sale of cigarettes in the ordinary way. If so, a granting of such licenses is not warranted nor even provided for by the ordinance. If, however, a cigarette store for the sale of cigarettes in the ordinary way is actually intended, then such licenses may be granted, even though legitimate vending machines are to be used by the applicant, or someone in charge thereof, such machines being subject to inspection and condemnation as possible gambling devices. But in the latter case, the application for such license must meet all the objections heretofore raised to the applications in their present form.

(No. 6367—February 15, 1929—L. H.)

TAX ANTICIPATION WARRANTS, SALE BELOW PAR.

In the absence of statute tax anticipation warrants may be sold below par under authority of the City Council acting in good faith.

Hon. H. Wallace Caldwell, President, Board of Education:

You have asked for an opinion as to the right of the Board of Education to advertise its tax anticipation warrants for sale and to sell them to the highest bidder.

This question arises by reason of the fact that there are indications that they may have to be sold below par. The real question, therefore, is whether they may be sold below par when necessary to do so in order to raise money.

Tax anticipation warrants in this respect stand on the same footing as bonds. In other respects they differ materially from bonds, but with respect to the rate at which they are to be sold it is reasonable to assume that if bonds may be sold below par the same rule would apply to tax warrants. There does not appear to be a direct decision on the point at issue in the law reports of Illinois, and in other jurisdictions the authorities are not entirely uniform. There is, of course, no doubt whatever, that where there is an express provision in the law forbidding the sale below par, it cannot be done, but in the absence of such a provision it would seem that the weight of authority inclines to the view that it is permissible.

The following appears in a recent text-book which is regarded as high authority:

“Statutes sometimes expressly authorize the sale of bonds at less than par; and in the absence of any provision to the contrary, a municipality may sell its bonds for less than their face value. However, some statutes or charters expressly forbid the sale of municipal bonds at less than par. In such a case, if there is accrued interest, it must be counted in, and the bonds cannot be sold for their face value.” McQuillin on Municipal Corporation, 2d ed., sec. 2463.

Another author expresses himself as follows:

“Express statutory authority to issue bonds implies the power to issue them in the ordinary and usual manner; and the municipality may, by virtue thereof, *sell* the bonds and use the proceeds for the purposes intended, that being the mode most generally adopted in similar cases. When the statute prescribes the *method of sale*, such method is the only

method that can be followed. Hence, if it is required that the bonds shall be sold to the highest bidder after advertisement, **no other disposition** of the bonds can be made. Power of a municipality to issue and sell bonds carries with it the implied power to secure such reasonable and necessary assistance as may be requisite to bring about an advantageous sale, and to this end the municipality, acting in good faith, may *employ a broker* regularly engaged in the business. * * * Persons purchasing the bonds from the municipality are bound to take notice of the power of the municipality in this respect, and a sale of the bonds at less than par is absolutely void *inter partes* if expressly prohibited by law." Dillon on Municipal Corporation, 5th ed., sec. 895.

In the case of *Sherlock v. Village of Winnetka*, 68 Ill. 530, the Supreme Court strongly condemned a sale of bonds below par, but the transaction was so thoroughly permeated with fraud and was so manifestly improper that the decision must be looked upon as one that condemned the particular transaction because it was tainted with fraud rather than the laying down of a principle on the question before us.

So far as tax anticipation warrants are concerned, as distinguished from bonds, they are to be issued only for the ordinary and necessary expenses of the government. In other words, they are to be issued only for the purpose of enabling the government to function. Our law contemplates that the sale of such warrants is the method by which it shall function for three-fourths of the year. Hence, when for any reason they cannot be sold it is equivalent to a situation under which the government is unable to function. Under such conditions, in the absence of an express prohibition, it would seem that the government may adopt such measure as the law fixes for functioning even though some loss might result. The sale of such warrants at a discount under those conditions must

be construed as an incidental expense connected with the sale, and not as an evasion of the law limiting the rate of interest. The authority of the City Council "to control the finances of the corporation," in the absence of an inhibition against such sale, must be understood as sufficient to enable the City Council to so handle the only means at hand so as to make it possible for the government to function.

Since there are no adjudicated cases to which we can turn for light on the subject, the question is not entirely free from doubt, but in our opinion the City Council will be justified in selling tax anticipation warrants in good faith to the highest and best bidder even though the bid will not net par.

(No. 6368—February 15, 1929—L. H.)

1 TAX ANTICIPATION WARRANTS, DUE DATE.

Tax anticipation warrants, whether issued by the City of Chicago or by the Board of Education may have a definite date for payment.

2 GENERAL WARRANT ACT AND SCHOOL ACT, CONSTRUCTION, INTEREST.

The General Warrant Act and the School Act in so far as it relates to tax anticipation warrants are construed and enforced together; the maximum rate of 6 per cent interest in the General Warrant Act being modified by the maximum rate of 5 per cent interest in the School Act.

Hon. H. Wallace Caldwell, President, Board of Education:

We are in receipt of your letter of recent date in which you ask for an opinion in regard to the validity of placing

a due date on tax anticipation warrants of the Board of Education.

The statute governing the issuance of tax anticipation warrants is the general act for this purpose entitled "An Act to provide for the manner of issuing warrants upon the Treasurer of the State or of any county, township, city, village, or other municipal corporation and jurors' certificates," approved June 27, 1913, as amended. There is a provision in the School Act (section 132) which modifies the provisions of the General Warrant Act so far as the City's Board of Education is concerned, but does not conflict with the General Warrant Act. Hence, the two acts are to be construed together and enforced accordingly.

Section 3 of the General Warrant Act contains the following provision:

"Warrants may be issued under this Act payable at the time fixed therein, and every warrant issued under this Act shall bear interest, payable only out of the taxes against which it shall be drawn, at the rate of six per centum per annum, from the date of its issuance until paid, or until notice shall be given, by publication in a newspaper or otherwise, that the money for its payment is available, and that it will be paid on presentation, unless a lower rate of interest shall be specified therein, in which case the interest shall be computed and paid at said lower rate."

Since the Act says that warrants may be issued "payable at the time fixed therein," it was clearly the intention of the Legislature that there should be a time fixed for payment. In other words, the provision for a due date is statutory, and there can be no question about it. By section 1 of the same Act this provision is made applicable to such warrants drawn and issued upon the "treasurer of the state or of any county, township, city, village or other municipal corporation, or against any fund

in his hands." Therefore, the provision is applicable to the Board of Education both by reason of the fact that it is a municipal corporation and by reason of the fact that the City Treasurer has the school funds and therefore they are "funds in his hands."

The provision above quoted is subject to the modification contained in the following language, taken from section 132 of the School Act:

"* * * and when there is not sufficient money in the treasury to meet the ordinary and necessary expenses for educational and for building purposes, to request the city council, whose duty thereupon it shall be, to order issued warrants against and in anticipation of any taxes levied for the payment of the expenditures for educational and for building purposes to the extent of seventy-five per cent of the total amount of the taxes levied for such purposes: *Provided, however*, that warrants drawn and issued under the provisions of this section shall show upon their face that they are payable solely from said taxes when collected, and not otherwise, and shall be received by any collector of taxes in payment of taxes against which they are issued, and such taxes (against) which said warrants are drawn shall be set apart and held for their payment. Every warrant issued against said taxes shall bear interest, payable annually out of the taxes against which said warrants are drawn, at a rate of not to exceed five per cent per annum, from the date of their issuance until paid, or until notice shall be given by publication in a newspaper or otherwise that the money for the payment of said warrants is available and that said warrants will be paid on presentation."

It will be observed that the last quotation fixes the method by which school tax warrants are to be issued. This does not conflict with the provisions in the General Warrant Act, but merely specifies by whom and in what manner the warrants are to be issued. The fixing of a maximum rate of interest at five per cent is in conflict

with the General Warrant Act, which permits six per cent. To this extent, therefore, the General Warrant Act is modified by the School Act. Otherwise there is no conflict, and the provisions of each may be enforced. It should be noted that in the School Act there is also provision made for paying interest annually. This can be done by fixing the date of the annual interest payment in the warrant itself, or by attaching one or more interest coupons, as may be deemed expedient. When the statute says that the warrants "shall bear interest, payable annually," it is clear that the interest date may be fixed, and the money obtained from the taxes when the date arrives may be used for the payment of such interest. To guard against duplicate payments, coupons may be used.

(No. 6369—February 18, 1929—S. G.)

VEHICLE LICENSE, APPLICATION.

An application for a vehicle license can be made only at the office of the City Collector or by mail.

Hon. Patrick Sheridan Smith, City Clerk:

In answer to your letter of February 11, 1929, wherein you inform us of a request made upon you by the Chicago Motor Club to direct the City Collector and the City Clerk to detail clerks from their offices, together with the necessary tags, license forms and other printed forms, to the office of the Chicago Motor Club, for the purpose of issuing vehicle licenses and tags for the current year, please be advised that we know of no legal authority to permit such a course of action.

Section 4065 of the Chicago Municipal Code of 1922 provides as follows:

“Any person, firm or corporation desiring a license for any such motor vehicle, wagon or other vehicle shall file an application with the city collector, upon a form provided therefor, which shall set forth the name and address of the applicant, a description of the motor vehicle. * * *”

Section 96 of the Chicago Municipal Code of 1922 provides as follows:

“License fees, fees for inspection, fees for permits compensation for franchises and all other payments of money not otherwise specifically provided for, to the city, *shall be paid direct to the city collector*, and such payments shall be by the city collector transmitted daily to the city treasurer; provided, that where the public convenience requires it, the department of finance may authorize the payment of license fees and fees for permits to be made to the officer authorized to issue such license or permit; and provided, further, that collections by the water bureau shall be paid direct to the city treasurer; and provided, further, that collection of fines by the municipal court shall be transmitted according to law to the city collector.”

The above section specifically provides that all payments of license fees be made direct to the City Collector, and in that section whatever exceptions are made to that general rule are specifically included therein, and we find nothing in section 96, or any other provision of the Chicago Municipal Code, which would legally permit the collection of vehicle tax licenses to be made at the office of the Chicago Motor Club, or any other institution.

We have had, in the past, numerous requests by many well-intentioned groups and organizations, who desire to assist the City Collector in his collection of vehicle tax license fees, and since there is no legal authority in the

Code that would authorize such collection in that manner, we do not think that you have the right to detail clerks from your office to the office of the Chicago Motor Club for the purpose of issuing vehicle licenses and tags for the current year. We see no reason, however, why the applications which are distributed generally throughout the City cannot be obtained by applicants and mailed in to the City Collector the same as is done with applications for State licenses, thereby removing any inconvenience on the part of the applicant.

(No. 6370—February 21, 1929—F. J. V.)

1 CIVIL SERVICE, ELIGIBLE LIST, OMISSION OR RETENTION OF NAMES.

Names upon a civil service eligible list may be omitted or retained according to the order of the Civil Service Commission; and under the rules of the Commission eligible lists are in effect two years and one day from date of posting unless otherwise ordered by the Commission before the expiration of the list.

2 CIVIL SERVICE, ELIGIBLE LIST, RESTORATION OF CANCELLED NOT PERMITTED.

The Civil Service Commission has no power to restore an eligible list which had expired and no provision had been made before such cancellation to save it or any part of it.

3 CIVIL SERVICE, APPOINTMENT, PERSONS FROM EXPIRED ELIGIBLE LIST.

Persons whose names appear in the card index of an eligible list which has expired are not entitled to certification or appointment.

4 CIVIL SERVICE ACT.

Sections 4 and 10 of the Civil Service Act leave it entirely to the discretion of the Civil Service Commission whether names from an eligible list shall or shall not be stricken therefrom after the expiration of two years.

Hon. Albert W. Goodrich, Fire Commissioner:

In your communication of the 19th instant you direct to our attention what you say is an existing "civil service eligible list" for the position of Division Fire Marshal, formerly Assistant Fire Marshal. You state that such list consists of a merger of two lists, one posted in 1916 and the other in 1921. You further state that in your opinion a thirteen-year-old list and another seven-year-old list "does not serve the best interests of the Fire Department

nor the City of Chicago" and you ask the Law Department "to advise what legal action can be taken to have the aforesaid list cancelled and an examination held for this position, as a result of which a new eligible list could be created."

The facts which our research of the civil service records disclose are that the first list was posted January 5, 1916, as the result of examination No. 2695; the second list was posted October 1, 1921, derived from examination No. 3431. Since the posting of the second list, there now remain on the first list, the following names: Thomas Kenny, Michael Kerwin and Frank Grady. These names were merged with those of later list, and on the so-called merged list there appear, in addition to the three names above given, those of Edward McGurn and Francis Byrnes.

Of the five persons whose names continue to appear on this so-called merged eligible list, two have been certified and appointed to the position of Division Fire Marshal, so that their names have no legal or proper place on this list,—Kerwin, March 2, 1925, and McGurn, April 11, 1927. The other three are also without legal or proper standing on such so-called eligible list for the reason that both said lists have long since expired by operation of the Civil Service Commission's existing rule on the subject of expiration of registers.

By virtue of section 4 of the Civil Service Act, the Commission is empowered and directed to "make rules to carry out the purposes of this Act, * * * and the Commission may, from time to time, make changes in the original rules." And by section 10 of the Act it is provided "said Commission may strike off names of candidates from the register after they have remained thereon more than two years."

This last provision of the Civil Service Act leaves it entirely to the discretion of the Commission whether the names from such eligible register shall or shall not be stricken therefrom or be permitted to remain thereon after expiration of two years. According to the records of the Civil Service Commission there obtained from the year 1919 to November, 1928, the following rule governing the expiration of eligible lists or registers as stated in the Twenty-fifth Annual Report of the Civil Service Commission for the year 1919, to wit.:

“Rule III, Sec. 4. Expiration of Lists. Eligible lists shall expire by limitation of time in two years and one day from date of posting thereof, unless the Commission, before the expiration of such time on any list, shall order otherwise.”

It is obvious that by operation of the rule just stated, the eligible list posted January 5, 1916, from examination No. 2695 has long since expired, and even if the names remaining on said list can be said to have been properly merged with those of the second list posted October 1, 1921, from examination No. 3431, this second merged list also expired by operation of the foregoing rule on October 2, 1923. There is, therefore, no warrant whatever for the contention that there exists any eligible list for the position of Division Fire Marshal or Assistant Fire Marshal. Both these lists having expired by operation of the Commission's own rule, any such list or cards purporting to constitute such list in the files of the Civil Service Commission's office are wholly without legal warrant or legal existence. Nor is this situation changed or in any manner affected by the adoption of a different rule by the Civil Service Commission on November 28, 1924, such altered rule being stated in the Thirty-first Annual Report of the Civil Service Commission for the year 1925 as follows:

“Rule III, Sec. 6. Expiration of Registers. Names remaining on eligible registers for two years and one day shall continue to remain on such eligible registers, unless the same shall have been stricken therefrom by the Commission.”

On June 1, 1928, we directed an opinion to His Honor, William Hale Thompson, Mayor, holding that it was not within the power of the Civil Service Commission to restore any cancelled eligible list. This applies whether such list was actually cancelled by a specific order of the Civil Service Commission under the last rule cited or to list or lists such as here involved which are automatically cancelled by operation of the other rule of the Commission, also cited. We do not deem it necessary to restate or even to quote from the opinion of the Corporation Counsel to His Honor, the Mayor, which is here referred to. That opinion fully covers the case here presented and calls attention of the Civil Service Commission to certain of its rules and administrative regulations which apply and govern their official actions and duties in the case.

Since there is no eligible list from which any certification can be made, there is therefore, nothing that the Civil Service Commission may do or need do to cancel the so-called merged eligible list, and there exists no right in any of the three persons whose names still appear in the card index of such list, to certification or the appointment to the position of Division Fire Marshal. A temporary may be appointed to the position pending the holding of a promotional examination to create a new eligible list. Furthermore, any qualified eligible for such position might force the holding of such examination as was recently held in the case of *People ex rel. Waters v. Finn et al.*, 241 Ill. App. 621, and *People ex rel. Roderick v. City of Chicago*, 283 Ill. 462.

(No. 6371—February 21, 1929—F. J. V.)

1 CIVIL SERVICE EXAMINATION, LIMITATION AS TO CERTAIN CLASS UNLAWFUL.

The requirement that civil service original examinations shall be open to all citizens of the United States makes it unlawful to confine such examinations to a particular class or to those coming from a certain school.

2 CIVIL SERVICE, POSITIONS, CLASSIFICATION.

Positions are created and defined by the corporate authorities of the different municipalities, and after a position has been created the position may be classified by the Civil Service Commission in accordance with the official record creating the same.

3 CIVIL SERVICE ACT.

Section 6 of the Civil Service Law makes it unlawful to confine an original civil service examination to those coming from a certain school or class.

Hon. Thomas J. Houston, President, Civil Service Commission:

Your communication of the 15th instant in reference to examinations to be held for the positions of probation officer, truant officer, school clerk and janitress, was received together with a letter from the President of the Board of Education making certain recommendations for qualifications of school clerks. You ask for an opinion as to the recommendation that the examinations for the position of school clerk be open only to those persons who have been graduated from the Chicago Normal School. The recommendation is also made "that in the event that the civil service is precluded from confining the requirements to Chicago Normal Graduation * * * additional weight in marking the examination papers be given nor-

mal school graduates which would automatically eliminate from eligibility those candidates who had not had the advantage of normal training."

Neither the original recommendation to limit eligibility to take the examinations nor the alternative recommendation that additional weight be given to the examination papers of normal graduates so as thereby to effect the elimination of other candidates taking the examinations, can lawfully be carried out. Section 6 of the Civil Service Act expressly provides with reference to all civil service examinations that they "shall be public, competitive and free to all citizens of the United States, with specified limitations as to residence, age, health, habits and moral character." It is obvious from this provision of the Civil Service Law that the examinations for the position of School Clerk must be held open to all citizens of the United States, and that therefore eligibility of candidates can not be limited to those persons only who have graduated from the Chicago Normal School, or who have normal school training. And, what the law says can not be done directly can also not be done by indirection, such as here proposed, that more weight shall be given to the examination papers of normal school graduates than to the papers of the other candidates.

Said section 6 must guide the Civil Service Commission in the conduct of these examinations. In this respect the section says, "such examinations shall be practical in their character, and shall relate to those matters which will fairly test the relative capacity of the persons examined to discharge the duties of the positions to which they seek to be appointed, and shall include the tests of physical qualifications and health, and, when appropriate of manual skill."

We note the recommendation that the examinations for the position of School Clerk be applied to two classifications, which, as stated by the School Board are as follows:

“Group A, for service in the high schools and district superintendents’ offices only; requires expert stenography and experience in secretarial duties; acts as secretary to the principal.”

“Group B, for service in the elementary schools; requires expert typing, mimeograph work, filing and ability to compile reports made up by the schools.”

The question arises here whether or not the School Board has created two separate positions or places of employment as here defined by Groups A and B. The Civil Service Commission can classify only in accordance with the positions as created and defined by the School Board, similarly as the City Council creates positions and places of employment. The Civil Service Commission can conduct the examinations for such positions and places of employment as are thus actually created and defined by the School Board and made a matter of record in the minutes of their proceedings. Whether or not the Commission can adopt the suggestion made here, of conducting two examinations and accordingly make two classifications, must depend upon the record of the School Board as above indicated. Upon such record there might also arise the question of whether one of the suggested groups would be met by original examination and the other one necessarily require a promotional examination. This question would have to be decided by the Commission upon the character and description of the positions as defined by the School Board’s record.

You ask that our opinion cover the Commission’s “rights in the premises.” We believe that the foregoing opinion covers all the recommendations as submitted to us by the School Board in the matter of the proposed examinations for School Clerk.

(No. 6372—February 25, 1929—W. W.)

1. WATER RATES, TENDER, ACCEPTANCE.

A tender of payment in the usual course of business of a water charge accruing from date a new tenant or owner has taken possession must be accepted as of the date when tendered and a discount should be allowed if the tender is made in apt time.

2. WATER RATES, NATURE OF ACCOUNTS.

Water rates are debts against the individual tenant or property owner and are not a lien upon the property; so that when there is a change in possession a new account should be opened against the new tenant or owner separate and distinct from the charge or account existing prior to such change of possession.

Joseph J. Ward, Esq., Superintendent of the Bureau of Water:

You have requested an opinion from this office regarding the liability of Garard Trust Company to pay charges on a certain bill for meter rates water service.

The facts, as set out in your request are as follows: Prior to November 2, 1928, the premises involved (being the Grosvenor Apartment Hotel, 5216-20 Kenwood avenue, Chicago, Illinois), were not in the possession and control of the Garard Trust Company. On November 2, 1928, said company was appointed receiver, under a bill for a receivership, and, as such receiver, took possession of and operated from November 2, 1928, and is still in possession of and operating said premises. An unpaid charge amounting to \$133.80 had accrued against the prior operators for meter rates water service covering the period from August 18, 1928, to November 2, 1928.

The Garard Trust Company have offered to pay the water charges from November 2, 1928, to the present time and had tendered its check in the regular course of business to the Bureau of Water for \$63.24, which amount is the charge as shown on the Bureau's water bills from November 2, 1928, to December 29, 1928, with the 15 per cent discount allowed and deducted. The check was received, dated as of the date of issuance, on a day prior to the date when the 15 per cent discount privilege had expired. The disclaimer with the accompanying affidavit, which is the method provided by section 4159 of the Chicago Municipal Code of 1922 by which a new tenant may be absolved from paying the water bills accruing prior to the latter's possession, was not filed when the check was tendered. You now submit for our opinion the question whether the 15 per cent discount should be allowed on the charge for this period, covering Garard Trust Company's possession, the check for which had been tendered in time for the discount to apply, even though the new operator did not make the disclaimer of the prior charge and submit the affidavit with said disclaimer as provided in said section 4159.

A careful reading of sections 4157, 4158, 4159, 4160 and 4161 of said Code shows that the City Council had in mind when it enacted those sections that the delinquent water accounts and the current water accounts should be regarded as separate and distinct charges. Those sections read as follows:

“4157. *Delinquent premises—to be cut off.*) After the expiration of the time of payment specified hereinbefore for each of the districts, a list shall be compiled of those premises for which assessed rates and charges remain unpaid, and the water supply of the premises against which such rates and charges remain so outstanding, shall be cut off by the department of public works. If, however, at any time the premises

are visited for this purpose they shall be found vacant, so that said cutting off would not be liable to serve the purpose of enforcing collection, said cutting off shall not be mandatory if because of the buffalo or shut off box or the stop-cock being out of repair, such act entails the expenditure of any sum for labor or material disproportionate to the amount of such delinquent rates. If after the expiration of thirty days from the date on which any bill for rates or charges under meter rates is rendered, said bill shall remain unpaid the water supply to the premises served by such meter or meters shall be shut off, and shall not again be turned on until the rates or charges so outstanding have been paid.

“In any situation where the shutting off of water service is liable to involve the city in litigation, or where the property involved is in the hands of a court, such shutting off may be postponed pending advice from the corporation counsel; or if such shutting off would be productive of public danger, or would create a pestilent situation, or would entail suffering by a great number of persons who are not liable for the payment of the delinquent bill, or where the premises involved are the property of the United States of America, of the State of Illinois, or of any of its political subdivisions, such shutting off may be withheld if in the judgment of the commissioner of public works the withholding of such shutting off best serves the interest of the City of Chicago.

“4158. *Change in ownership of delinquent premises.*) Where water rates and charges under assessed rates appear upon the records of the bureau of water as unpaid, and where claim shall have been made that the ownership of the property for which such rates and charges are unpaid have changed, by foreclosure or otherwise, and the new owner or owners disclaim responsibility for the payment of water rates and charges accumulated prior to the time of their acquiring ownership, it shall be the duty of the superintendent of water to require the new owner or owners to make affidavit as to the time of purchase, stating in such affidavit the date of the deed, the name of the grantor, and address if known, together with the record by book and page, as shown by the recorder's

office in which such deed is recorded. When such affidavit, executed in a manner satisfactory to the superintendent of water, shall be presented, said superintendent shall accept payment of rates and charges beginning with the date of such new ownership as evidenced by said deed and affidavit, and shall transfer the unpaid rates and charges accumulated prior to such change in ownership to suspense account number 1, and shall proceed to collect the unpaid rates and charges from the person or persons liable therefor.

“4159. *Change in tenancy of delinquent premises.*) Where rates and charges for water registered by meter appear upon the records of the bureau of water as unpaid, and where the present or prospective occupant shall make disclaimer of responsibility for such unpaid rates and charges because such water had actually been supplied to a previous occupant, upon presentation of evidence satisfactory to the superintendent of water that there has actually been a change in occupancy and that the present or prospective occupant is not liable for the payment of such unpaid rates, and had no knowledge that said unpaid rates had accrued, said superintendent may issue a bill for consumption of water beginning with the date when such new occupant became liable, and shall transfer the unpaid rates and charges accumulated prior thereto to suspense account number 2, and proceed to collect rates accumulated prior to that time from the person or persons liable therefor. Any person making disclaimer under the provisions of this section shall be required to produce an original lease properly signed, and also an affidavit in which shall be set forth the date of such lease, the period over which it extends, the name and last previous address of the lessee, the name and address of the lessor, and the date on which possession was acquired. Said affidavit shall also set forth the name and present address of the previous tenant, if such is known to affiant, or if unknown this fact shall be set forth, also whether or not the affiant has at any time acted as agent of the premises, and whether or not he had knowledge at the time of signing such lease, that unpaid water rates had accrued.

“The provisions of this section shall not apply to an assignment of an existing lease and such assignment shall not be considered as sufficient reason for releasing either assignor or assignee from liability for payment of water rates and charges accumulated during the period covered by such existing lease.

“4160. *Suspense accounts to be opened.*) The commissioner of public works shall cause to be opened in the general ledger of the bureau of water two accounts, to be known as the suspense accounts number 1 and number 2. In suspense account number 1 shall be shown the totals of all of the accounts and items which may under any section relating to frontage rates accounts, be ordered transferred; and in suspense account number 2 shall be shown the totals of all the items which may under any section relating to meter rates accounts, be ordered transferred.

“4161. *Ledgers for suspense accounts.*) The commissioner of public works shall provide suitable detailed ledgers, in which the detailed accounts of suspense accounts number 1 and number 2 shall be kept and shown. All accounts affected by order of court and recommendations of the corporation counsel shall come within the scope of this section.”

But, irrespective of the provisions of the Code quoted above, we believe, as a matter of general law, that the charges are separate and distinct items. Since the water charges are not liens against the property but are to be regarded as debts against individuals, then, when the individuals change, a new account is opened. It follows that a tender of payment made in the usual manner of doing business for the water charge accruing from the date the new operator took possession as shown in the water bill presented to that person, in apt time for the discount privilege to apply, must be accepted as of the date when tendered. The charge accruing prior to the possession of the present operator, being a separate and distinct charge, must be considered alone and unaffected by the current charge.

We are therefore of the opinion as far as the current bill is concerned, that the Bureau of Water should accept the check of the Garard Trust Company for \$63.24 as of February 5, 1929, which is the amount of the current bill less the prevailing discount, in full for meter rates water service from November 2, 1928, to December 29, 1928.

(No. 6373—February 26, 1929—L. H.)

1 LICENSE, REVOCATION, PERSONAL LIABILITY.

The Mayor is not personally liable for revoking a license which had been issued through an error and in violation of an ordinance and after he has satisfied himself that cause exists for such revocation.

2 LICENSE, ISSUANCE IN VIOLATION OF ORDINANCE.

The mere issuance of a paper purporting to be a license confers no right and imposes no obligation on the City where the "license" is issued in violation of an ordinance.

Hon. William Hale Thompson, Mayor:

You forwarded to us a letter from the Commissioner of Buildings, under date of February 6, 1929, in which he asks you to revoke license No. 1497 issued to Dave Netchin, for a retail food business of class 2, at 4607 Prairie avenue. The Commissioner states that it was issued contrary to the provisions of the Zoning Ordinance through an error in the Department of Buildings. You have asked us to advise you whether any liability will arise against the City or against you personally in the event that you revoke the license.

In case this license is revoked by you after inquiry as to the cause, and after you are satisfied that the cause exists, no liability can attach by reason of such revocation. No right accrues to a person who obtains a license that was improvidently issued in violation of an ordinance. The rule which governs in such cases is that the person who obtains the license is bound to take notice of the ordinances, and, if the official who issued it exceeded his authority or issued it by mistake, the mere issuance of the paper purporting to confer the license carries no right with it and imposes no obligation on the City. *Hibbard, Spencer, Bartlett & Co. v. City of Chicago*, 173 Ill. 91; *Burton & Co. v. City of Chicago*, 236 Ill. 383; *Meltzer v. City of Chicago*, 152 Ill. App. 334.

We therefore beg to advise you that such action as you deem proper, in accordance with our recommendation that you inquire into the facts, may be taken by you without subjecting yourself to any legal liability on account of it.

(No. 6374—February 27, 1929—F. J. V.)

1 CIVIL SERVICE, REHEARING, REINSTATEMENT,
RULES.

The Civil Service Commission under present law has neither express nor implied power to grant a rehearing and thereupon to set aside the Commission's order of discharge and place discharged persons upon the reinstatement and eligible list for certification and appointment to their former positions long after they have been discharged by final order of the Commission; but the Civil Service Commission may by rule provide for reasonable consideration of an accused civil service employee in the nature of a petition for a rehearing before a finding and order of discharge are entered of record and for a continuance of such cause to a later date for rehearing and final disposition.

2 OFFICES AND OFFICERS, REMOVAL, NATURE OF.

Although the exercise of the power of removal from public office involves judgment and discretion, it is not a judicial act, for the reason that there is no such thing as title or property in public office.

3 EXECUTIVE ACTS, APPEAL FROM.

Courts have no power to grant a rehearing or to try charges *de novo* on appeal in case of executive or quasi-judicial orders or decisions, as courts can only review judicial acts.

4 WORDS AND PHRASES.

Quasi-judicial acts or functions are those which require discretion on the part of an administrative officer when acting upon facts submitted to him for determination.

5 CIVIL SERVICE ACT.

Section 4 of the Civil Service Law does not permit the Civil Service Commission to provide by rule for a rehearing after a final order or decision of record has been entered.

Hon. William F. Russell, Commissioner of Police:

We have your statement that nine certifications are to be made by the Civil Service Commission pursuant to your

requisition for appointment to the positions of police patrolman. You state that seventeen men were reinstated last month to the list of eligible patrolmen who have been discharged by the Civil Service Commission for various causes, and that "it is not believed that any of these were reinstated by court order." (Our inspection of the Commission's records discloses that twenty-seven such reinstatements were made last month.) Your communication concludes with the statement that "an opinion is desired as to whether or not the law is mandatory upon the (Commissioner of Police) to accept men in the department who have thus been restored to the reinstatement list."

These reinstatements are illegal and void for want of power in the Civil Service Commission to make them, and consequently they confer no rights whatever upon those who are thereby presumed to have been reinstated, and they impose no duty whatever upon the Commissioner of Police to accept such certifications or to make appointment thereon.

The controlling principle in this case is the constitutional separation of the powers of government into the executive, legislative and judicial and the absolute sovereignty, and independence of each of these powers in its respective spheres. The Constitution prohibits any usurpation of or encroachment upon the power of one branch of government by another. (*Marbury v. Madison*, 1 Cranch 137, 2 L. ed. 60.) As said in Black's Constitutional Law, p. 91:

"It is not competent for the executive officers of the government to assume any share in the making of laws. Their business is merely to enforce the laws.
* * *

"It is also a limitation on the executive power that no officer of that department should be charged with

duties or invested with functions which properly belong to the judiciary. But it is not incompetent to provide in a statute that charges of its violation shall be heard and determined in the first instance by an executive officer where an appeal to the courts is given. *Niagara Fire Ins. Co. v. Cornell* (C. C.), 110 Fed. 816. And there is no violation of the constitution in providing for a trial or hearing before an executive officer in regard to such matters as the removal of public officers. *State v. Wells*, 210 Mo. 601, 109 S. W. 758; *In re Hertle*, 120 App. Div. 717, 105 N. Y. Supp. 765."

The Legislature has power to delegate to civil service commissioners the authority to enact and enforce rules governing the appointment and promotion of public officers, their tenure of office, and their removal therefrom. Since there is no title or property in a public office, the removal of the officer is not a judicial act. *People v. City of Chicago*, 234 Ill. 416; *People v. Kipley*, 171 Ill. 44.

Judicial power does not apply to cases where judgment is exercised as incident to the execution of ministerial power. *Klafter v. Examiners of Architects*, 259 Ill. 1, 20; *Owners of Land v. People*, 113 Ill. 296.

To the questions involved in this opinion the case of *City of Aurora v. Schoeberlein*, 230 Ill. 496, has pertinent application. What is said in this case of the fire and police commissioners applies with equal force to the civil service commissioners. (*People v. City of Chicago*, 234 Ill. 416, 418.) On page 502 of the case of *City of Aurora v. Schoeberlein*, *supra*, it is said:

"The board of fire and police commissioners of the City of Aurora is a branch of the executive department of the city government, and all the acts and powers of the board are purely ministerial or executive. The legislature could not confer upon the board any judicial power whatever. By article 3 of the

constitution the powers of the government are divided into three distinct departments,—the legislative, executive and judicial,—and it is provided that no person or collection of persons, being one of these departments, shall exercise any power properly belonging to either of the others, except as thereafter expressly directed or permitted. By section 1 of article 6 the judicial powers are vested in certain courts, and a board of fire and police commissioners cannot assume or exercise any part of the judicial power. (*George v. People*, 167 Ill. 447.) Neither does the act purport to give to such boards any judicial power. They are authorized by statute to remove an officer for cause, after a hearing and an opportunity to make a defense, and that authority implies the power to judge of the existence and sufficiency of the cause; but there is no such thing as title or property in a public office and the removal of an officer is not the exercise of judicial power. (*Donahue v. Will County*, 100 Ill. 94; *Stern v. People*, 102 *id.* 540.) No right of life, liberty or property was involved or adjudicated before the board in this case. Although the exercise of the power of removal involved judgment and discretion, it was not a judicial act. It has been said that where an act is the result of judgment and discretion and a decision upon the facts it is of a judicial nature; but there is a clear distinction between such acts and the exercise of judicial power which adjudicates upon and protects the rights and interests of individuals and to that end construes and applies the law.”

The particular question for decision here is, has the Civil Service Commission power to grant a rehearing and thereupon to set aside the Commission’s order of discharge and place the discharged person upon the reinstatement eligible list for certification and appointment to his former position in the civil service?

No such authority is expressly granted by the Civil Service Act. Nor do we believe that such power may rightly be inferred or implied from the powers that are granted. Expressly granted are the following powers:

(1) By section 3, the duty as well as power to classify all the offices and places of employment in the City with reference to examinations provided for, except such offices and places mentioned in section 11, the offices and places so classified to constitute the classified civil service of the City.

(2) By sections 6 and 7 the Commission is required to subject all applicants for the civil service to examinations to be conducted as in these sections provided.

(3) Section 8 empowers the Commission to make and keep registers of eligibles obtained from examinations of candidates for appointment to the civil service.

(4) Sections 9 and 10 authorize and direct how certificates of eligibles shall be made for appointment respectively to promotional and original positions in the civil service; section 10 also providing for temporary appointments.

(5) Section 12 on the subject of removals we set out in full for it is here that we should expect to find the authority, express or necessarily implied, to authorize a rehearing of charges for removal and the reinstatement of a discharged civil service employee. The section follows:

“Sec. 12. *Removals.* No officer or employee in the classified civil service of any city who shall have been appointed under said rules and after said examination, shall be removed or discharged except for cause, upon written charges and after an opportunity to be heard in his own defense. Such charges shall be investigated by or before said civil service examination, or by or before some officer or board appointed by said commission to conduct such investigation. The finding and decision of such commission or investigating officer or board, when approved by said commission, shall be certified to the appointing officer, and shall be forthwith enforced by such officer. Nothing in

this act shall limit the power of any officer to suspend a subordinate for a reasonable period, not exceeding thirty days. In the course of an investigation of charges each member of the commission, and of any board so appointed by it, and any officer so appointed, shall have the power to administer oaths and shall have power to secure by its subpoena both the attendance and testimony of witnesses, and the production of books and papers relevant to such investigation. Nothing in this section shall be construed to require such charges or investigation in cases of laborers or persons having the custody of public money, for the safekeeping of which another person has given bonds."

Stated in substance the foregoing are all the powers vested in the Civil Service Commission in the matter of appointments to and removals from the classified civil service of the City. Nowhere in the Civil Service Act, not even in said section 12 on the special subject of removals, is there any express grant of authority for rehearing the "charges (which) shall be investigated by or before said Civil Service Commission, or by or before some officer or board appointed by said Commission to conduct such investigation."

Section 4 of the Civil Service Act does not, in our opinion, warrant or support the rule of the Civil Service Commission by which the Commission itself provides for a rehearing of the charges and order of removal of one in the civil service. Section 4 of the Civil Service Act provides that:

"Said commission shall make rules to carry out the purposes of this act, and for examinations, appointments and removals in accordance with its provisions. * * *

Although this section of the Act *expressly* empowers the Civil Service Commission to make rules, such rules are

expressly limited to such as are "*in accordance with its provisions*," and, as we have just observed, there is no provision in the Act, not even in the section providing for removals, for a rehearing upon charges, once "*the finding and decision of such Commission or investigating officer or board, when approved by said Commission, shall be certified to the appointing officer, and shall be forthwith enforced by such officer.*" Section 12 of Act.

The removal of a public officer upon charges and investigation is an act of the executive branch of the government, and although the Commission exercises functions similar to those of the courts, the removal from office upon such hearing is not a judicial act. This, however, is as far as the cases heretofore cited go. None of the cases supports the proposition that an arm of the executive branch of the government may conduct rehearings, new trials, appeals or proceedings *coram nobis*, all of which are judicial powers to be exercised exclusively by the courts of the judiciary. The proceedings of the Commission for the removal of a civil service employee, so long as it is confined to the investigation and the finding and order of discharge thereon, is quasi-judicial; but when the Commission undertakes to grant and conduct rehearings for setting aside its ministerial act for the removal from office, it is usurping the exclusive power of the courts.

"Quasi-judicial functions are those which lie midway between the judicial and ministerial ones. The lines separating them from such as are thus on their two sides are necessarily indistinct; but, in general terms, when the law, in words or by implication, commits to any officer the duty of looking into facts, and acting upon them, not in a way which it specifically directs, but after a discretion in its nature judicial, the function is termed quasi-judicial.' Mechem, Pub. Off., Sec. 637; Bishop, Non-Contract Law, Secs. 785, 786. 'Where a power rests in judgment or discretion, so that it is of a judicial nature or character,

but does not involve the exercise of the functions of a judge, or is conferred upon an officer other than a judicial officer, the expression used is generally "quasi-judicial." * * * The officer may not, in strictness, be a judge; still, if his powers are discretionary, to be exerted or withheld according to his own view of what is necessary and proper, they are in their nature judicial.' Throop, Pub. Off., Secs. 533, 534."

The decision upon which an order of discharge is entered is final and terminates the Commission's jurisdiction, even as the expiration of the term of court at which a judgment is rendered terminates the jurisdiction of the court or judge over the case in which such judgment was entered. Rehearings in equity and new trials at common law are judicial procedure by which courts of the judiciary may retain jurisdiction and revise, modify or set aside their former judgments. As said in *Watson v. Roller Skating Rink Co.*, 177 Ill. 203, at page 206:

"While, in form, the decree of August 12, 1892, may have been final, the filing by the defendant of its petition for a rehearing at the same term at which the decree was rendered, and the cause being continued to a subsequent term upon that petition, had the effect of suspending the operation of the decree and of retaining jurisdiction over the subject-matter at the subsequent term, and the court had the power, at the later term, to amend, alter, modify or vacate the decree. *Hibbard v. Mueller*, 86 Ill. 256; *Hearson v. Graudine*, 87 *id.* 115; *People v. Springer*, 106 *id.* 542."

But an inferior or quasi-judicial body has no such power. The Civil Service Commission cannot, by a rule of its own for a rehearing, even upon compliance with such rule, retain jurisdiction of the case after decision and order of discharge have been entered. Such decision is so far final as an act of the executive branch of the government that even the courts have no power to grant a rehearing, or

to try such charges *de novo* on appeal; for the courts to do so would be to usurp the exclusive powers of the executive branch of the government. As said in *City of Aurora v. Schoeberlein*, 230 Ill. 496, 504:

“The section in question purports to authorize an appeal from any order of the board by any person interested or affected, and if it should be sustained it would result in the circuit courts assuming and exercising executive powers. They would practically control the appointment and removal of members of fire departments in the cities of this State to which the act applies, by the exercise of judgment and discretion as to fitness and qualifications of individuals for positions in such departments, and not by adjudicating rights or applying the rules of law. That would be the exercise of executive powers, which the separation of departments of the government precludes the court from exercising.”

Again as to the stability and permanent character of the decision and order of the Commission, the Supreme Court, in the case of *People ex rel. Miller v. City of Chicago*, 234 Ill. 416, at page 421, says:

“Under the decisions of this court we think the finding of the trial board, approved by the civil service commission, as shown by this record, cannot be set aside by the courts. (*City of Chicago v. People*, 210 Ill. 92; *Kenneally v. City of Chicago*, 220 Ill. 485; *Kammann v. City of Chicago*, 222 *id.* 63.) The contention of appellee in this regard, if upheld, would practically amount to a review of the evidence by the courts in all investigations conducted by the civil service commission or under its direction. This is not the law. As was said in *City of Aurora v. Schoeberlein*, 230 Ill. (p. 504), such a review by the courts ‘would be the exercise of executive powers, which the separation of departments of the government precludes the court from exercising.’ ”

So it is that even the courts may not rehear or review the finding of the Civil Service Commission with a view

to substituting their finding for that of the Commission which is final.

The perpetuity of government is said to depend in no small degree upon the stable, permanent and inviolable character of the judgments of our courts, the established rules of law and the certain and orderly administration of governmental affairs. There could be no dependency whatever placed upon the court's adjudication of rights, if at will a court might rescind, set aside and hold for naught a final judgment rendered and entered of record in a case. Much worse must be the result of an uncertain and unrestrained policy of reversing and setting aside the final executive orders of government affecting the regular and orderly administration of affairs.

Involved in this opinion is the action of the Civil Service Commission by which it has set aside the records of discharge of twenty-seven former police patrolmen entered upon hearings had at various times during the last five years, and has ordered the names of such discharged patrolmen to be placed upon a reinstatement list for certification and appointment as eligibles to their former positions.

This violates both the letter and the spirit of the Civil Service Act. Justice Vickers, in the case of *People v. Errant*, 229 Ill. 56, at page 61, said:

"In construing the law or rules made to carry out its provisions certain considerations which led to its adoption must be kept in view. The first and most important object to be accomplished by a system of civil service is to increase the efficiency of the service. This is a worthy purpose and one that appeals to the good sense and sober judgment of thoughtful men. To accomplish this great purpose the Civil Service Law seeks to remove the service to which it applies from the domain of party politics and readjust it on a common-sense, business basis, placing before the

officer or employee every possible inducement to render faithful and conscientious service. Among the means devised to secure the highest degree of efficiency are the assurance that the employee is not in danger of being swept from his place by an unfavorable turn of political wind, and that faithful, honest and efficient service in one position will open up possibilities for future promotion to a better one. The success of the system, in the nature of things, rests primarily with the persons charged with its administration. So long as the administrative agents are making an honest effort to carry out the provisions of the law in its true spirit they should be left free to exercise a reasonable discretion in all matters depending on information of details and local conditions."

If the power as exercised in this case be deemed legal, then what the Supreme Court speaks of as "the assurance that the employee is not in danger of being swept from his place by an unfavorable turn of the political wind," could not longer be doubly assured, for with the so-called "unfavorable turn of the political wind" might come a change in administration and a new Civil Service Commission, who, if so disposed, might, by setting aside the former Commission's records of discharge, sweep from their places many efficient civil service employees to give place to those resurrected from the civil service cemetery. And this exercise of power also would materially operate against efficiency in the public service by removing the fear that for sufficient causes civil service employees may be discharged from the service; and it would necessarily lessen the hope and incentive "that faithful, honest and efficient service in one position will open up possibilities for future promotion to a better one."

Nor are these all the consequences to follow in the wake of such exercise of power. To set aside an order of discharge is, in effect, to declare the original discharge of the

employee wrongful and unlawful, to entitle him to immediate reinstatement to his former position (*People ex rel. McDonnell v. Thompson*, 316 Ill. 1) and to give him a right of action against the City for all his back salary that may not have been paid to *de facto* holders of the position who performed the services. (*O'Connor v. City of Chicago*, 327 Ill. 586; *Hittle v. City of Chicago*, 327 Ill. 443.) As held in the case of *People ex rel. McDonnell v. Thompson*, *supra*, the right of the discharged employee, upon the setting aside of his order of discharge, is to immediate assignment in his former position, even to the displacement of another since appointed to the service. There is no power whatever in the Civil Service Commission to place a discharged civil service employee on a reinstatement list. When his record of discharge is set aside it is as if he had never been discharged. The reinstatement, therefore, must come from the head of the department and not from the Commission. A discharged civil service employee, having no legal place upon any reinstatement or eligible list cannot, therefore, be lawfully certified by the Commission, nor is the discharged employee eligible to appointment to a vacancy to be filled, for which the department head has made requisition, nor can such department head be compelled to recognize such a certification and to make such appointment.

Even if the Civil Service Commission may be conceded to have the power to grant rehearings and to set aside its final decision and order of discharge, it must be held to be bound, as the courts themselves are bound, by the rule of laches in exercising such rehearing in behalf of discharged civil service employees. It is the established rule of the judiciary that one in the civil service who is discharged by order of the Civil Service Commission after a hearing had upon written charges before the Commis-

sion, is guilty of laches, if he does not file his petition for certiorari within six months from the date of such discharge, and his right to the writ is therefore barred. *People v. Burdette*, 285 Ill. 48; *Schultheis v. City of Chicago*, 240 Ill. 170; *Cox v. Finn*, 239 Ill. App. 670; *Cronin v. Finn*, 243 Ill. App. 645.

In *Funkhouser v. Coffin*, 301 Ill. 257, the Supreme Court says:

“It is established by a long line of decisions that by writ of *certiorari* the court has no power to pass upon the findings and conclusions of the commission, but may examine the proceedings to ascertain whether the inferior tribunal had jurisdiction, and the facts upon which such jurisdiction is founded must appear in the record, which also must show that the commission acted upon evidence. If the court finds the inferior body had no jurisdiction or had exceeded it or had **not proceeded according to law**, it will quash the proceedings.”

But under the cases above cited, even the remedy of certiorari for reviewing the record of the Commission to determine whether the Commission had jurisdiction and proceeded according to law must be sought *not later than six months from the date of the order of discharge*.

And it has been held that it is no excuse for laches that the Civil Service Commission had under advisement and undisposed of a petition for rehearing filed within thirty days of the date of discharge. In the case of *Cox v. Finn*, *supra*, where the Appellate Court reversed the Circuit Court's order quashing the record of the Civil Service Commission, the Appellate Court said:

“But we need not discuss whether the evidence should tend to support the special charges in a case where it tends to support the general charges and the petitioner is present with counsel and apparently has every opportunity to defend himself (as in the case

of appellee), if, as here contended, the petitioner was guilty of *laches* in suing out the writ. The order of discharge was entered and went into effect February 9, 1923. The writ was not sued out until February 27, 1924, over a year later. No excuse is set forth for such delays except the commissioners had under advisement her petition for a rehearing filed within 30 days of the discharge and not denied until February 7, 1924. Even if the rules of the Commission authorize a rehearing, as alleged in the petition for the writ, petitioner was not precluded thereby from suing out the writ immediately after her discharge or at least after waiting a reasonable time for action thereon. But she waited over a year after her discharge, during which time the position may have been filled and the salary paid to another. Such a consideration was deemed pertinent in determining whether a writ of error was prosecuted with diligence in *People v. Burdette*, 285 Ill. 48, where the petitioner was held guilty of *laches* in not filing his petition within six months after his discharge. We do not think this case can be distinguished in its material facts bearing on the question of diligence from those in that case, and, therefore, for reasons there stated the court below should either have issued the writ or should have quashed it. Accordingly the judgment is reversed."

If the Civil Service Commission is authorized to adopt a rule for granting rehearing, we do not believe that the Appellate Court would have treated the pending petition for rehearing as having no effect whatever upon the complainant's right to the writ of certiorari, or as furnishing no excuse whatever for failure to bring action within six months from date of discharge. The rule of *laches* runs from the date of the discharge order, regardless of whether a petition for rehearing was made and disposed of or not.

It is our opinion that any petition for rehearing, if legal at all, is invalid and void if not disposed of within six months from the date of the Commission's order of discharge. Therefore, upon this view alone, every case

of reinstatement here made upon a record of discharge set aside is wholly illegal and futile.

Every record of discharge here *judicially* quashed and set aside by the Civil Service Commission itself upon the assumption of authority to grant a rehearing at this late date, is wholly without express or implied warrant under the Civil Service Act and is without any sanction whatever in recognized executive governmental procedure. Any appointment of a discharged patrolman based upon this action of the Civil Service Commission will constitute a violation of section 3 of the Civil Service Act which provides that "the offices and places so classified by the Commission shall constitute the classified civil service of such city, and no appointments to any of such offices or places shall be made except under and according to the rules hereinafter mentioned" (those of the Act itself and those of the Commission authorized by section 4 of the Act). Such illegal certification and appointment of the discharged patrolman can confer no right upon him, and must be set aside by the courts upon proper action by any civil service eligible to the position whose name regularly appears on the original eligible register or legally authorized reinstatement list.

It is our opinion that a rule of the Civil Service Commission may be adopted to provide reasonable consideration for the accused civil service employee at the hearing upon charges, in the nature of a petition for rehearing to be interposed after the finding is announced, but before the finding and order of discharge are entered of record, the cause being continued by the Commission to a later date fixed either by the rule or order of the Commission, when the matter of rehearing may be disposed of and the final decision and order be entered of record. Such rule would have the sanction of proper executive action, avoid

conflict with the powers of the judiciary and be in accord with the provisions of the Civil Service Act.

(No. 6375—February 27, 1929)

1 REWARD, CITY COUNCIL'S POWER TO OFFER, APPROPRIATION.

The City Council has power to offer a reward to those rendering services or giving information leading to the arrest and conviction of a band of murderers and outlaws who threaten the peace, security and safety of the people residing within the limits of the City, and to appropriate money for the same.

2 ANNUAL APPROPRIATION ORDINANCE, CONTINGENT FUND, AMENDMENT.

The contingent fund to the Commissioner of Police if absolute and unconditional cannot be used in offering a reward for the apprehension of criminals without amending the Appropriation Ordinance at the proper time.

3 ADDITIONAL OR SUPPLEMENTAL APPROPRIATION, PASSAGE OF AND ITS REQUIREMENTS.

In cities having a population of 100,000 or more a two-thirds vote of all of the members of the City Council may pass an additional or supplemental appropriation ordinance at any time within the first half of the fiscal year.

To the Honorable, the City Council of the City of Chicago:

Replying to your request for an opinion as to whether the City Council has the power to offer a reward for information or services leading to the arrest and conviction of the perpetrators of the murders committed at 2122 North Clark street on February 14, 1929, we submit the following:

The question involves two legal propositions: First, as to the right of a municipality to offer a reward or compensation for services or information leading to the arrest and conviction of a person for the violation of a State law; and, second, as to the way in which the money is to be appropriated for the payment of such reward.

FIRST. While the general rule is that in the ordinary commission of a crime in violation of a State statute a municipality does not possess the power to offer a reward for the apprehension or conviction of the person, or persons, committing such crime, we believe that the extraordinary facts and circumstances surrounding the commission of the crime in question and the unusual elements entering into the commission of the same take this case out of the ordinary rule applying to a crime committed solely against the State and vest in the City of Chicago full legal authority to make an appropriation of money to be expended as compensation for services rendered and information obtained in apprehending, prosecuting and convicting the perpetrators of this crime. For the violation of a City ordinance protecting its inhabitants the City would have the unquestioned power to make such an appropriation.

However, in addition to the protection which a City gives to its inhabitants through formal ordinances duly passed by the City Council, there is vested in the City the power to protect and preserve the safety and well-being of its inhabitants.

It is manifest that the appalling crime committed on North Clark street on February 14th was a well-organized assault by a band of outlaws upon and against the security and safety of the people within the corporate limits of the City of Chicago and against and in defiance of the orderly administration of the constituted authority of the

municipality. In addition, therefore, to the wrong done to the State, this organized invasion of the City by a band of outlaws constitutes a menace and a real danger to the peace, security and safety of the people living within the limits of the City of Chicago and a challenge and defiance to the authority and dignity of the municipal government itself.

We believe, therefore, that the City of Chicago has the power to offer compensation to those offering services or information leading to the arrest and conviction of the perpetrators of this horrible crime.

SECOND. As we understand, it is the thought of the Finance Committee to recommend for passage by your Honorable Body an ordinance authorizing the sum of \$20,000 to be spent from the contingent fund of the Commissioner of Police in securing information leading to the arrest and conviction of the persons guilty of the crime in question, and to provide in the said ordinance for reimbursement of the said sum to the contingent fund of the Commissioner of Police from the corporate fund.

From our investigation we find that the Annual Appropriation Ordinance in making an appropriation to the contingent fund of the Commissioner of Police was absolute in terms and contained no reservation of control or supervision in the City Council. This being so, we believe that an ordinance at this time making any appropriation out of this contingent fund as a reward for the apprehension of these criminals would constitute an attempted amendment of the Appropriation Ordinance, which is beyond the authority of the City Council at this time.

However, we are informed by the Comptroller's office that there are funds in the miscellaneous receipts (not

otherwise appropriated) and which are not derived from annual taxes, sufficient to pay this \$20,000 reward. This being so, there is no obstacle in the way of the City Council passing an additional or supplemental appropriation ordinance making an appropriation of this \$20,000 from such miscellaneous receipts, as provided by section 2, article VII of the Cities and Villages Act, which is as follows:

“Provided, however, that in cities and villages having a population of 100,000 or more, the city council or board of trustees, as the case may be, may at any time within the first half of the fiscal year by a two-thirds vote of all the members of such body, pass additional or supplemental appropriation ordinances making appropriations from any receipts derived from any other source than the annual taxes levied in accordance with the provisions of section 1 of article VIII of this Act.”

(No. 6376—February 27, 1929—G. F. M.)

1 POLICE PENSION, CHILD UNDER 18.

A policeman's child who has not reached 18 years and while regularly attending school is entitled to a pension of \$15 per month until he or she attains the age of 18, where the policeman has been killed in the performance of an act of duty and his widow has also died leaving such child.

2 PENSIONS, LAW GOVERNING.

The law in force at the time a right to pension accrues fixes the right to a pension.

3 POLICE PENSION FUND ACT OF 1915.

This act was not repealed but merely superseded by the Act of 1921.

Retirement Board, Policemen's Annuity and Benefit Fund:

Replying to your request for an opinion as to the pension rights of an orphaned minor child whose father was killed in the performance of an act of duty on January 21, 1916, the following is submitted:

Your letter states that Bror A. Johnson, a policeman of the City of Chicago, was killed in the performance of an act of duty on January 21, 1916; that he left him surviving a widow, May Johnson, and his minor child, Mary Rose Johnson, that the child was born November 12, 1914; that the widow was awarded a pension of \$55 per month, being half of the final salary of Patrolman Johnson and that the widow died on January 19, 1929.

At the time Mr. Johnson was killed there was in force and effect the Police Pension Fund Act of 1915 which gave a pension to the widow of a policeman who was killed in the performance of an act of duty and which further provided that in the event the widow died then the natural

child of such policeman should receive the pension therein provided for the widow.

In 1917 the Police Pension Fund Act of 1915 was amended so as to provide that if a policeman died leaving no widow or if the widow died before his children arrived at the age of eighteen years, then each child should receive, while regularly attending school, the sum of \$15 per month until such child attained the age of eighteen years.

It is a fundamental principle of the law governing pensions that the right to a pension and the amount thereof are fixed by the law in force at the time such right would accrue. *Eddy v. Morgan*, 216 Ill. 437; *Pecoy v. City*, 265 Ill. 78.

The right of Mary Rose Johnson to any pension accrued upon the death of her widowed mother on January 19, 1929, and the law then operative was the present Policemen's Annuity and Benefit Fund Act of 1921.

Section 50 of this latter Act provides that a child less than eighteen years of age of a policeman who shall become a pensioner under the Act of 1915 as amended shall be paid a pension in accordance with the provisions of that Act. Nothing is said in this present Act relative to a child of a policeman who was killed in the performance of an act of duty and whose widow was in receipt of a pension at the time this Act came into force and effect. However, the Police Pension Fund Act of 1915 as amended in 1917 has never been repealed but was simply superseded by the Act of 1921 and so far as concerns matters not specifically legislated upon in the Act of 1921, the provisions of the Act of 1915 as amended are still in force and effect. Earlier enactments continue in force unless clearly repugnant (*City of Chicago v. Oak Pk. El. R. R.*,

261 Ill. 478), and the Act of 1921 specifically refers to the pension provisions of the Act of 1915 as amended and makes them by reference a part of the present act. *People v. Hanson*, 330 Ill. 79, 89.

The right of Mary Rose Johnson to a pension, having accrued to her subsequent to the amendatory act of 1917, any pension right vested in her would be such right as is given to her under the amendatory act of 1917, which is a pension of \$15 per month until she attains the age of eighteen years.

I am of the opinion that Mary Rose Johnson is entitled to receive a pension, while regularly attending school, in the amount of \$15 per month from the date of the death of her mother until she attains the age of eighteen years.

(No. 6377—March 4, 1929—F. J. V.)

ANNUAL APPROPRIATION ORDINANCE, DESIGNATION OF
OBJECT, PAYROLL.

The Annual Appropriation Ordinance appropriating to the Commissioner of Gas and Electricity, in designating "conduit trench diggers," "linemen helpers" and "laborers" and in fixing a separate per diem for each class indicate an intention that the appropriation shall be expended in accordance with such designation and that payrolls shall carry each class separately.

Hon. Michael J. Kennedy, Commissioner of Gas and Electricity:

In your communication of the 1st instant you refer to "—the appropriation ordinance for 1929, Council Proceedings, p. 4442 under account 52-A-6 (in which) ap-

pears an item 'Laborers as Conduit Trench Diggers' and 'Linemen Helpers' at \$7.00 per day, and 'Laborers' at \$5.45 per day.....\$90,000." You ask the question, "—can employees be carried on the payroll and paid from this appropriation as 'Linemen Helpers' at \$7.00 per day without the use of the word 'Laborers.' "

In the language of the appropriation there are three classes of employees expressly provided for, namely: "Conduit Trench Diggers," "Linemen Helpers" and "Laborers." That the City Council clearly intended "Linemen Helpers" as in a class higher in grade than ordinary laborers is indicated by the much higher wage provided for "Linemen Helpers"; and this is a prime consideration for the Civil Service Commission in making their proper classification of places of employment in the civil service. *People ex rel. v. Errant*, 229 Ill. 56, 63.

We are of the opinion that the places of employment designated in the ordinance as "Conduit Trench Diggers," "Linemen Helpers" may properly be carried on the payroll without the additional word "Laborer," with proper reference to the specific item of the Council's appropriation of \$7 per day.

(No. 6378—March 8, 1929—L. H.)

GAGE FARM, SALE, COMPTROLLER.

The conditions and the time for receiving bids for the sale of the Gage Farm are left entirely to the discretion of the City Comptroller; with which discretion there can be no interference by outsiders.

Hon. George K. Schmidt, City Comptroller:

You turned over to us a letter addressed to you from Mr. Meyer H. Gladstone, which contains a demand on you to proceed with the sale of the property of the City known as the Gage Farm. You ask for advice with respect to same.

The City Council, by ordinance (Council Journal, July 11, 1928, p. 3421), directed that this property should be advertised for sale, but by express provision in the same ordinance it left the conditions and the time of receiving bids entirely to the discretion of the City Comptroller.

Under these conditions the party making the demand on you to proceed with the sale would have no right to force you to action even if he could show such special interest in the matter as would entitle him to a right to compel a sale if peremptorily ordered by the City Council.

We therefore beg to advise you that it is not necessary to make any explanation or other answer to the writer of the letter in question.

(No. 6379—March 8, 1929—G. F. M.)

1 POLICE PENSION, WIDOW IN 1915.

A pension of \$50 is payable to a wife who has been widowed subsequent to July 1, 1915, by the death of a husband who became a pensioner under the Act of 1887.

2 PENSIONS, LAW GOVERNING.

The right to a pension including the amount thereof, is fixed by the law in force at the time such right vests or accrues.

Retirement Board, Policemen's Annuity and Benefit Fund:

Replying to your request for an opinion as to the amount of pension to be paid the widow of an old law pensioner who died subsequent to January 1, 1922, the following is submitted:

Your letter states that Lieut. John B. Stokes resigned from the Police Department March 17, 1909, after rendering 29 years, 8 months and 16 days' service; that he was awarded a pension of \$75 per month, being half his final salary; that he died September 27, 1928; that his widow was awarded a pension of \$50 per month, and that application has been made to increase the same in accordance with section 3 of the Act of 1887 as subsequently amended.

The right to a pension and the amount thereof are fixed by the law in force at the time such right vests or accrues. (*Eddy v. Morgan*, 216 Ill. 437; *Pecoy v. City*, 265 Ill. 78.) Lieut. Stokes having died on December 27, 1928, the right of his widow to a pension is determined by the law in force on that date.

The only law applying to pensions for widows of old law pensioners which was in effect at the date of the death

of Lieut. Stokes is found in section 50 of the Policemen's Annuity and Benefit Fund Act which provides that widows of policemen who are pensioners under the Act of 1915 as amended shall, upon the death of such pensioner, have a right to receive pensions in accordance with the provisions of the Act of 1915 as amended.

While Lieut. Stokes retired in 1909, and thereby became a pensioner under the Police Pension Act of 1887, when the Police Pension Act of 1915 was enacted, the latter act contained a provision in section 12 thereof to the effect that the Act of 1915 should supersede the Act of 1887 and that all persons who, upon the taking effect of the Act of 1915, were receiving pensions under the Act of 1887, should receive no further payment under said Act of 1887 but should be entitled to the pensions provided for in the Act of 1915, so that Lieut. Stokes became a policeman pensioner under the Act of 1915.

In 1917 the Police Pension Fund Act of 1915 was amended so as to provide a pension not to exceed \$50 per month for widows of policemen.

I am of the opinion that the widow of Lieut. Stokes is entitled to a pension of not more than \$50 per month as provided in the Police Pension Fund Act of 1915 as amended in 1917; and that the provisions of the Act of 1887 relative to pensions for widows of policemen do not apply to widows of policemen who died subsequent to July 1, 1915, the date upon which the Police Pension Fund Act of 1915 went into force and effect, nor to the widows of policemen who died subsequent to January 1, 1922.

(No. 6380—March 11, 1929—L. H.)

ANNUAL APPROPRIATION ORDINANCE, FIRE COMMISSIONER'S CONTINGENT FUND, ADVERTISING FILMS.

Films used in connection with the prevention and extinguishment of fires, including the education of the public with respect to emergencies may be paid for from money in the Fire Commissioner's contingent fund.

Hon. George K. Schmidt, City Comptroller:

We are in receipt of your letter of recent date to which you attached copy of a letter to you from the Fire Commissioner in relation to the bills of the Rothacker Film Corporation.

The question presented is whether you would be justified in paying the bills of the Rothacker Film Corporation in view of the decision of the Supreme Court with reference to the right of the City to expend corporate money for the purpose of advertising proposed bond issues.

While the suit just referred to was pending in the Circuit Court we advised you that it was not proper to make payments on account of the advertising of the bond issues which the City Council had undertaken to authorize. Necessarily, since the Supreme Court decision holding that such expenditures would be unlawful, it follows that such bills cannot lawfully be paid.

It seems, however, from the letter of the Fire Commissioner, which was written before the Supreme Court opinion was handed down, that the obligation to the Rothacker Film Corporation is of a somewhat different nature. It is said in that letter:

“The obligation incurred by this department is somewhat different to an ordinary bill-post advertise-

ment, pamphlet or newspaper ad, inasmuch as the moving picture was taken of a number of activities of the department and several films of this picture made. These films are now the physical property of the Fire Department and besides having been used in connection with our proposed bond issue, the pictures have been displayed in several instances, in and out of the department for educational purposes.''

In case the bills are for films that were and are now used for purposes having a legitimate connection with the prevention and extinguishment of fires, including the education of the public with respect to emergencies, and the Fire Commissioner will so certify on the bills, they can be paid from the money in the Fire Commissioner's contingent fund. We recommend, however, that care be taken to make a record, as nearly full and exact as possible, of the various uses to which the films were put, so that it will appear from same that the expense is not one of the kind interdicted by the court.

(No. 6381—March 11, 1929—L. H.)

1 CITY COUNCIL, MEMORIALS, POWER TO APPROPRIATE FOR.

The City Council has power under sections 1 and 2, article V of the Cities and Villages Act to appropriate money for the purpose of constructing memorial buildings, monuments and other public ornaments designed to inspire sentiments of patriotism or of respect for the memory of worthy individuals.

2 CITIES AND VILLAGES ACT.

Sections 1 and 2, article V of the Cities and Villages Act, the one giving authority "to control the finances and property of the corporation," and the other "to appropriate money for corporate purposes," imply power in the City Council to appropriate money for the purpose of providing a suitable memorial in celebration of the 150th anniversary of the locating in Chicago Territory of Jean Baptiste Point De Saible as the first settler in said territory.

3 ANNUAL APPROPRIATION ORDINANCE, FINANCE COMMITTEE, CONTINGENT AND MISCELLANEOUS EXPENSES.

The appropriation for contingent and miscellaneous purposes made to the Finance Committee of the City of Chicago may be used to provide a suitable memorial for the celebration of the 150th anniversary of the locating in Chicago territory of Jean Baptiste Point De Saible as the first settler in said territory.

4 WORDS AND PHRASES.

The term "corporate purpose" includes making provision for memorials to inspire sentiments of patriotism or of respect for the memory of worthy individuals.

Hon. John S. Clark, Chairman, Committee on Finance:

Your committee has requested of this department an opinion as to the right of the City to expend corporate funds for the purpose set forth in a resolution presented

by Alderman Robert R. Jackson on January 5, 1929, and the propriety of making the payment out of a certain appropriation mentioned therein.

You forwarded the resolution in question with your letter. It is designed to provide for a memorial to celebrate the 150th anniversary of the locating in Chicago territory of Jean Baptiste Point De Saible, who is said to be the first settled here. It directs that the Chairman of the Committee on Finance be authorized to provide a suitable memorial for the celebration of this occasion and to charge the cost thereof to Account 3-S-2.

The City Council has authority "to control the finances and property of the corporation"; and "to appropriate money for corporate purposes only." Necessarily, these powers imply a wide discretion on the part of the Council as to what is and what is not a corporate purpose. It would not be an abuse of that discretion to apply money of the City to the purpose mentioned in the resolution.

In *McQuillin on Municipal Corporations*, the author mentions, among corporate purposes for which funds may be expended by a municipality, "erection of a soldiers' and sailors' memorial arch as an expression of patriotism and to beautify a public place," and in a note appended thereto states the following:

"It is well settled that reasonable use of public money for memorial buildings, monuments and other public ornaments, designed merely to inspire sentiments of patriotism or of respect for the memory of worthy individuals is for a public purpose."

The same author refers, in this connection, to the case of *Barrow v. Bradley*, 190 Ky. 480, from which we quote as follows:

"Section 171 of our Constitution declares that, 'taxes shall be levied and collected for public pur-

poses, only.' Unless therefore the proposed indebtedness is for a public purpose it is prohibited by the Constitution and would be invalid even if it had been proposed by the General Assembly of the Commonwealth.

"But it is so well settled now that the reasonable use of public money for memorial buildings, monuments and other public ornaments, designed merely to inspire sentiments of patriotism or of respect for the memory of worthy individuals, is for a public purpose that it hardly seems necessary to devote time to a discussion of this branch of the case. *Kingman v. Brockton*, 153 Mass. 255, 26 N. E. 998; 11 L. R. A. 123, and notes; 19 R. C. L. 722; Judson on Taxation, section 349."

It would seem from the above that the use of corporate funds for the purposes of a memorial of the kind proposed is authorized, and it may be done on appropriate action of the City Council.

The only other question to be determined is whether the appropriation named in the resolution (Account 3-S-2) can be used for that purpose. This appropriation is made to the Committee on Finance, and includes, among other things, "miscellaneous and contingent purposes." Such an appropriation may be used for purposes that could not be foreseen at the time when the annual appropriation bill was passed. Its use in the manner here proposed has received the sanction of our courts on numerous occasions.

"In the case of *People v. Cairo, V. & C. Ry. Co.*, 247 Ill. 363, it was said: 'A contingent fund is necessary for all municipal corporations. The reason for making such a levy is to provide a fund, usually a small one, out of which items of expenses which will necessarily arise during the year, and which cannot appropriately be classified under any of the specific purposes for which other taxes are levied, may be paid. If all of the purposes for which a contingent fund could be used could be foreseen, so as to enable the municipality to specify each particular purpose,

then no contingent fund would be necessary. Every detailed item of expense would be classified under its appropriate name. It is because it is impracticable to always provide in advance for incidental expenses that will arise during the year that a contingent fund is usually provided by the various municipalities of the state.' See also *People v. Chicago & E. I. R. Co.*, 249 Ill. 551.

"It is immaterial whether the purposes of such appropriation is designated as 'contingent,' 'incidental' or 'miscellaneous.' It is clear that the appropriation is made to meet unforeseen expenses that may arise and cannot then be appropriately classified. The words are used interchangeably and mean the same thing." *Ward v. City of Du Quoin*, 173 Ill. App. 515.

From the above it will appear that the City Council will be within its rights if it passes the resolution you submitted to us and proceeds thereunder as proposed.

(No. 6382—March 15, 1929—W. W.)

TRACK ELEVATION, CITY COUNCIL, POWER TO ORDER.

It is within the power of a municipality to require railroad companies to elevate their tracks in streets or alleys or to permanently obstruct them without thereby causing a diversion of the street from its dedicatory purpose, or imposing an additional servitude on the street, or causing a vacation of the street or alley so as to revert the fee to the original owner.

Mr. Irving P. Ahern, Editor, South Town Economist:

In your request of recent date, you wish to know whether, as a general proposition, the elevation of steam

railroad tracks in the City of Chicago may block a thoroughfare previously existing across the tracks when laid at grade.

In this connection it may be well to quote from the opinion of Mr. Justice Wilkin of the Illinois Supreme Court in the case of *People v. A. T. & S. F. Ry. Co.*, 217 Ill. 594:

"We do not question the power of municipalities to order railroad companies within their corporate limits to elevate their tracks across all public streets and alleys, nor that they may not, in order to carry out the policy, authorize the vacation, closing or permanent obstruction of certain of its streets and alleys."

Our Supreme Court in the case of *Weage v. C. & W. I. R. R. Co.*, 227 Ill. 421, followed the above decision and said:

"This court has held that the authority of cities over its streets embraced the power to require the elevation of railroad tracks in public streets and alleys, and this power carries with it the authority to vacate, close or permanently obstruct such streets and alleys. The basis of this power and the necessity for its exercise is the protection of human life and the promotion of the public convenience and welfare. It does not rest upon and cannot be exercised solely for the benefit of the railroad company."

Further on this court in the same case said (quoting from the case of *Summerfield v. City of Chicago*, 197 Ill. 270):

"The great advantage to the public to be attained by the elevation of the tracks of railroads at street intersections of a city is too manifest to be questioned. Not only public convenience and the business of the community are advanced by the elevation of the tracks, but that which is by far the more important, the citizen is secured from the many dangers which imperil life and limb where the trains of railroad cars cross street intersections at grade.

The use of a street by a railroad, though lawful and legitimate, to some extent obstructs the street and to a degree deprives the citizen of the full and unrestricted use of it. That is inevitable. The elevation of the tracks of a railroad can not be accomplished at any street intersection, by any means or appliance now known to engineering skill, without placing something in the street that to some extent obstructs the use of the street by the general public. * * *

Though the walls of the subway and the retaining and lateral walls, made necessary by that plan of elevation, occupied more of the surface of the street than would have been occupied by the pillars and foundation of the pillars had the plan been adopted of elevating the tracks by means of a bridge, or viaduct, and therefore excluded the public from the street to a greater extent, still the question of the exclusion of the public was one merely of degree. The elevation of the tracks could not be secured without placing in the street some impediment to travel. It was indispensable that the surface of the street should be occupied by that which should serve as the foundation for the structure upon which the elevated tracks should rest. * * *

The merits of the different methods for elevating the tracks could not be determined alone by consideration of the question of the amount of space which would be required by the pillars or the walls. The facilities of passage and of transit, the safety and convenience of the public, should be controlling factors in the determination of the manner of effecting the elevation of the tracks. When these considerations demand the adoption of a plan of elevation which makes necessary the appropriation of portions of the street to a structure necessary to support the elevated tracks, such appropriation of the streets cannot be deemed an unlawful diversion of the street to the use of the railroad company. The public interest and the necessities of the public being conserved thereby, there would be no diversion of public property to private use. * * *

Nor can pillars or walls directed by the city council to be placed in the streets for the purpose of supporting elevated steam railway tracks at public street crossings be declared to be the subjecting of the streets to

an unlawful use. * * * The provisions of the amendatory ordinance authorizing the erection of the subway walls and the lateral and retaining walls in Stewart avenue can not, under the circumstances, be denounced as an unlawful perversion of Stewart avenue to the private use of the railroad company. The end to be attained was to accommodate the public business and increase the facilities and safety of transit along the street and the avenue and across the intersection thereof.' "

These cases were followed in the case of *Chicago, B. & Q. R. Co. v. Abens*, 306 Ill. 69, in which the court said:

"It has long been settled in this state that the maintenance of railroad tracks in the streets of a city and the operation of cars over them are legitimate uses of the streets, and that the city has power to require railroad companies to elevate their tracks in streets and alleys, and for this purpose may vacate, close, or permanently obstruct such streets and alleys. It is unnecessary to repeat here the reasoning by which the conclusion was reached that an ordinance requiring a railroad company to elevate its tracks, and permitting it, in order to comply with the ordinance, to obstruct portions of a street for its full width, does not cause a diversion of the street from the purpose of its dedication or impose an additional servitude on the street, and does not vacate the street so as to cause a reversion of the fee to the original owner, even though the ordinance declared the streets and alleys under the elevated roadbed and tracks discontinued and vacated. The question was fully considered and discussed, and the conclusion stated was reached in *Weage v. Chicago & Western Indiana Railroad Co.*, 227 Ill. 421, 81 N. E. 424, 11 L. R. A. (N. S.) 589, which cited previous decisions, and the same doctrine has been announced in similar cases."

According to these decisions we find that the primary object of railroad track elevations is to eliminate danger to which the public is subjected when compelled to cross tracks at grade. The elevation of the railroad tracks is

accomplished at the instance of the municipality. We therefore conclude that the blocking of streets by the elevation of railroad tracks in a manner outlined in your letter is legal. There is, however, nothing to prevent a subway being constructed at the intersection of a street when projected across a railroad track if and when urgently needed by the public. That is a question of fact which must be ascertained in every individual case.

If the interested persons in any particular community desire to take the matter up with this office we shall be pleased to confer with them or their representatives whenever convenient.

(No. 6383—March 18, 1929—G. F. M.)

1 POLICE PENSION, REFUND, ADOPTED CHILD.

An adopted child stands on the same footing as a natural child under section 39 of the Policemen's Annuity and Benefit Fund Act (previous to its amendment in 1927) in regard to inheriting from a police pensioner; and a refund of salary deductions of a deceased policeman leaving no child or widow but leaving an adopted child is payable to such child, where such policeman died prior to July 7, 1927.

2 POLICE PENSION ACT.

Section 39 of the Policemen's Annuity and Benefit Fund Act previous to its amendment in 1927 required payment of a refund to an adopted child as an heir of a deceased policeman.

Retirement Board, Policemen's Annuity and Benefit Fund:

Replying to your request for an opinion as to the distribution of a refund of salary deductions of a deceased

policeman who died leaving an adopted child but no natural child or widow, but leaving a will, the following is submitted:

Your letter states that John Fleming, No. 2, died in the service in December, 1926; that he was a widower at the time of his death and had an accumulation from salary deductions for annuity purposes in the amount of \$428.89; that he left a will in which he designated his two sisters, Nora and Alice Fleming, as executrixes; that he was survived by two brothers and two sisters and by an adopted child named Alice Fleming.

At the time of the death of patrolman Fleming, section 39 of the Policemen's Annuity and Benefit Fund Act provided for the payment of a refund under the circumstances indicated to the child or children of a deceased patrolman, and where such child or children were minors, then such refund was to be paid into the child's annuity fund and thence paid out in the form of annuity; but as no annuity was payable under the Policemen's Annuity and Benefit Fund Act to an adopted child and as there was no natural child, such refund remained subject to another provision of said section 39 reading as follows:

“And if there be no such children, such amount shall be refunded to the heirs of such policemen according to the law pertaining to estates of deceased persons.”

Under the law governing adopted children such adopted child becomes an heir of the adoptive parent and as the adopted child, Alice Fleming, is shown by the records of the Probate Court to have been the only heir of patrolman Fleming it follows that this refund is payable to such adopted child as the heir of the deceased policeman. Smith's Statutes, chapter 4, section 5, p. 97.

The amendment to section 39 providing for the payment of refunds to executors, administrators, etc., was not in force and effect until July 7, 1927, which was subsequent to the death of patrolman Fleming, and does not apply in this case because the right of the adopted child to this refund vested in her immediately upon the death of Mr. Fleming.

I am of the opinion that the refund in question should be paid to the adopted child, and as the records of the Probate Court show that a guardian has already been appointed for the minor in question, the refund should be paid to the guardian.

(No. 6384—March 19, 1929—G. F. M.)

MUNICIPAL PENSION, DISABILITY BENEFITS, FAILURE TO CONTRIBUTE.

The failure on the part of a disabled municipal employee to make contributions into the ordinary disability benefit fund during disability and while on leave of absence, does not deprive him of the right to receive ordinary disability benefits.

Retirement Board, Municipal Employees' Annuity and Benefit Fund:

Replying to your request for an opinion as to the right of a disabled employee to receive ordinary disability benefits when he has failed to make payment of the disability benefit contributions during a period of leave of absence due to illness, the following is submitted:

Your letter states that Mr. Hayes, a junior clerk employee in the Bureau of Streets, was separated as a junior

clerk June 19, 1924, and certified as a sanitary inspector of the Health Department; that on March 20, 1925, he resigned as sanitary inspector and on April 28, 1925, received a full refund of \$317.26 from your fund; that the civil service record shows that his name was restored to the list as a junior clerk in the minutes of November 30, 1925; that he was reinstated on December 5, 1925, as a junior clerk in the Bureau of Water; that on March 15, 1926, he was granted leave of absence for three months; that on May 12, 1926, he resigned; that on April 14, 1927, your fund again made a refund of \$6.72 on account of resignation of May 12, 1926; that in the minutes of February 20, 1928, an order was passed by the Civil Service Board cancelling his resignation and restoring his name to the list; that on March 7, 1928, he was reinstated in the Bureau of Streets; that on August 28, 1928, he was suspended for thirty days; that on September 27, 1928, he was granted a leave of absence for six months; that during July, 1928, the payroll check deducted the semi-annual amount for ordinary disability payments; that Mr. Hayes states that in January, 1926, he applied for a leave of absence in order to go to the United States Naval Hospital at Great Lakes, Illinois, for treatment for a condition resulting from service in the United States army during the World War; that he was in the hospital at the time his leave of absence expired and because of his inability to attend to having it renewed, his resignation was automatically accepted at the expiration of his ninety days' period.

Your communication is accompanied by a copy of a letter from Mr. Hayes in which Mr. Hayes states the following:

That in January, 1926, he applied for a leave of absence in order to go to the United States Naval Hospital

at Great Lakes, for a condition resulting from his service in the United States army; that he was in the hospital at the time his leave of absence expired and his resignation was automatically accepted; that when the situation was explained to the Civil Service Board upon his return to work, the Board cancelled the resignation and extended the leave of absence; that during practically all the time he was in the hospital he was disabled; that he should have applied for ordinary disability benefits but was so sick he never gave the matter any thought; that he was taken sick again with practically the same trouble in August, 1928, and had to go to the United States Veterans Bureau Hospital at North Chicago, Illinois.

These statements of Mr. Hayes are easily verified and for the purpose of this opinion will be taken as true.

It is very apparent from the situation as explained by Mr. Hayes that Mr. Hayes has been disabled practically all of the time since January, 1926, excepting during the period when he was at work subsequent to February, 1928; that he was entitled to receive and be paid ordinary disability benefits during such period of disability had he applied for the same; and that he is still entitled to such benefit should he make application therefor or should his present application include that period of disability.

Section 47 of the Municipal Employees' Annuity and Benefit Fund Act provides that ordinary disability benefit contributions shall be made by all municipal employees less than sixty-five years of age "except those who are in receipt of duty disability benefits or ordinary disability benefits."

While Mr. Hayes was not "in receipt of ordinary disability benefits" he was entitled thereto and the law holds that a provision referring to persons receiving benefits

includes those persons who are entitled to receive them upon application.

I am of the opinion that Mr. Hayes is entitled to be paid ordinary disability benefit for any period of time during which he was disabled, as shown by the records, and that failure on his part to make contribution into the ordinary disability benefit fund does not constitute ground for refusing such benefits for the reason that such contributions were not required from him by law during the period or periods of his disability.

(No. 6385—*March 21, 1929—F. J. V.*)

CIVIL SERVICE, DEFUNCT ELIGIBLE LISTS, APPOINTEES UNDER.

Persons who through an error of the Civil Service Commission have been regularly certified and appointed to civil service positions from defunct eligible lists are entitled to continue in their positions and to be carried on the civil service payrolls in the exact *statu quo* that they have maintained since their certification and appointment until a new eligible list is created; and they have the right to participate in any promotional examination for such list.

Hon. Carlos Ames, President, Civil Service Commission:

We are addressing to you this opinion recently requested by the former president, Thomas J. Houston. The request for this opinion is based upon another opinion of date February 21, 1929, directed to the Civil Service Commission, in which it was held that two merged eligible lists of January 5, 1916, and October 1, 1921, for the position of Division Fire Marshal, had expired by operation of law on October 2, 1923.

The communication states that "the Commission is now asking for an opinion as to the status of the following Division Fire Marshals:

John H. Touhey.....Promoted March 2, 1925
 Michael S. Kerwin.....Promoted March 2, 1925
 Richard W. Thomasius....Promoted March 2, 1925
 Anthony McDonaldPromoted March 1, 1926
 Charles N. Heaney.....Promoted August 1, 1926
 John J. Costello.....Promoted August 1, 1926
 Edward F. McGurn.....Promoted April 11, 1927
 George E. Graves.....Promoted November 5, 1927
 Oscar F. Malmberg.....Promoted April 25, 1928"

It is stated that these appointees were certified from said defunct, merged eligible list. The communication concludes with this statement:

"It is the duty of the Civil Service Commission to certify all payrolls before they are honored by the Comptroller, and before we certify any further payrolls for the Fire Department we would like to know if these men are to be carried on the civil service rolls or on a special roll as temporary appointees to the positions they now hold in the service."

First, as to the status of the men above named who have for their respective periods been serving as civil service Division Fire Marshals and who have been regularly examined, posted as eligibles, regularly certified and appointed, and who are now affected in their title to their positions only by the error of the Civil Service Commission in making certifications from such defunct eligible list—these men are entitled to continue in their present positions until a new eligible list shall be created by the Civil Service Commission. Until such list is created by a promotional examination there can be no lawful claimant to any of the positions now held by these incumbents. There is no one in the civil service who can legally claim a prior or paramount right to any of these positions; and

until a new eligible list for the position of Division Fire Marshal is created no one in the civil service, not even one who is filling the position of battalion chief, and certainly not a rank outsider on the pretext of a temporary appointment, can claim a right against any of these incumbents of the position. These appointees now serving are at least *de facto* holders of the positions with their titles supported by every provision of the Civil Service Law, affected only by the irregular certification from the defunct eligible list. Indeed they are *de jure* holders of their positions and must continue to be until possible claimants to these positions may arise upon the posting of a new eligible list.

All these incumbents of the position of Division Fire Marshal, under any circumstances, are battalion chiefs and as such are, of course, entitled to participate in the promotional examination for the creation of the new eligible list. We do not feel called upon at this time to go into any greater detail in the matter of the rights of the present incumbents with reference to the promotional examination which the Commission is now obliged to hold for this position.

This brings us to the second phase of inquiry made by the Commission as to whether or not "these men are to be carried on the civil service rolls or on a special roll as temporary appointees to the positions they now hold in the service." These men and their places on the regular payrolls should remain in the exact *status quo* that has been maintained since their certifications and appointments. It is inconceivable that they should be considered transformed into mere temporary appointees. The Corporation Counsel's opinion of the defunct character of the merged lists from which these men were certified and appointed, does not act retroactively to create vacancies.

in these positions at the times of the respective appointments of these men. Until such time as eligible list for Division Fire Marshal shall be created these men are as absolutely intrenched in their legal right to hold their respective positions as if no irregularity had occurred, that is, their appointment from the defunct list.

We conclude with the statement that the status of the present holders of the positions of Division Fire Marshal cannot be legally attacked and that there should be no change or disturbance of the payrolls, or the certification of these men as the regular civil service holders of such positions. And that a change, if any, in these respects cannot come until the creation of the new eligible list.

(No. 6386—March 21, 1929—F. J. V.)

1 CIVIL SERVICE, CHANGE OF TITLE, TEMPORARY APPOINTMENT.

The mere change of the name or title of a civil service employee does not operate to remove a regular appointee from his or her position; nor does it have the effect of authorizing the appointment of a temporary person to the old position under the new name.

2 CIVIL SERVICE, ELIGIBLE LIST, TEMPORARY APPOINTMENT.

Under present rules of the Civil Service Commission an eligible list is in effect beyond two years and all appointments made from such list until it is cancelled of record by the Commission are in effect.

Hon. Charles S. Peterson, City Treasurer:

We have your recent communication in which you ask for an opinion as to whether or not there may be lawful

authorization for temporary employment in the positions of junior stenographer and telephone operator.

As a reason for the appointment of a temporary in the place of a regular civil service junior stenographer, you state that, as City Treasurer, you have "addressed a request to the City Council for change of title of the junior stenographer to that of bookkeeping machine operator, so that the title of the position will conform to the character of the work performed." If the operation of the bookkeeping machine is a part of the junior stenographer's work, as that position is at present defined and classified by the Civil Service Commission, the mere change of name or title will not operate to remove a regular junior stenographer from her position, nor operate to authorize the appointment of a temporary to the old position under a new name. This question has been squarely decided by the Supreme Court in the case of *City of Chicago v. Luthardt*, 191 Ill. 516, 522. In that case it was attempted, through the City Council's action, by means of a change of the name of a position in the Police Department, to oust Luthardt from his position and appoint another to the same position with its new name. Furthermore, we understand that the position of junior stenographer is a generally recognized one existing and maintained throughout all the departments of the City.

It is within the power of the City Council, however, to create any new position that might be deemed necessary, and the Council might, therefore, appropriate for a position entitled, as suggested by you, "bookkeeping machine operator," or what might be of more general and practical application to the public service in that line, record machine operator. If so created by the City Council, such position would be classified by the Civil Service Commission as separate and distinct from that of junior

stenographer. Then, until an eligible list could be created from which certifications and appointments might be made to fill the new positions, temporary appointments would be authorized.

As to the position of telephone operator, your communication states that there exists a list of eligibles for such position. Under the present rule of the Civil Service Commission, such eligible list continues in full force beyond the period of two years and until such list is expressly cancelled of record by the Civil Service Commission. Therefore, it is immaterial that the list you refer to is over two years of age. You also refer to the present appropriation for this position as being \$1,500 whereas formerly it was but \$1,200. This fact also does not affect the situation. As against such existing eligible list there can be no legal authorization for the appointment of a temporary. Only a regular eligible for such position may be certified and appointed.

(No. 6387—March 26, 1929—F. J. V.)

CIVIL SERVICE, FAILURE TO PAY DEBTS, DEPARTMENT
RULE.

Departments of the City government may adopt a rule providing that the wrongful failure and refusal of a civil service employee to pay just and lawful obligations shall constitute conduct unbecoming an employee of the department and shall be cause for removal from civil service upon written charges of a violation of such rule preferred against such employee before the Civil Service Commission.

Hon. Richard W. Wolfe, Commissioner of Public Works:

We have your communication with enclosure of a complaint made by the Securities Discount Corporation against Mr. H. Becker, who is employed in the Water Works Department. It is said that Mr. Becker owes a balance of \$19.32 on a judgment rendered against him, which he refuses to pay because, as alleged, he considers himself immune from payment by reason of his civil service employment. You ask for an opinion for future guidance in the matter of complaints against civil service employees for failure to pay debts, and you ask particularly "whether or not charges could be filed against the employee for conduct unbecoming one in the City civil service."

According to our opinion, written July 5, 1927, and directed to the City Comptroller, which appears on page 142 of volume XVI, Opinions of the Corporation Counsel, an assignment of the wages of a civil service employee and a power of attorney authorizing the collection of such wages by a creditor are invalid as being against public policy. This rule operates in such a way as to make the salaries of civil service employees immune from the general methods for enforcing the payment of creditors'

claims against such employees. This matter of complaint registered with department heads against civil service employees for failure to pay their just obligations is not uncommon, and has been the subject-matter of several opinions and communications to various departments. On August 9, 1928, the Corporation Counsel directed an opinion to the City Comptroller in a matter of inquiry similar to this. In that communication we also referred to the foregoing opinion and said: "Since these means provided by the law for the collection of debts cannot be used against those in the civil service we know of no other means by which the department head may enforce the payment by his employees of the obligations they owe their creditors." We referred, however, to the Police Department which has an established rule against the failure of police officers to pay their rightful obligations, and the practice in that department of filing written charges against the police officer before the Civil Service Commission as a cause for the removal of such a delinquent officer for the violation of such rule. We also took occasion to say in a general way what also applies here, viz.: "whether such rule and its violation are a sufficient cause in law for discharging one from the civil service is a moot question. It may be that flagrant breach of obligation, such as is indicated in your communication, especially if credit has been obtained by the civil service employee upon the strength and recommendation of his position and its public service character, that the guilty person might be subjected to the charge of conduct unbecoming a civil service employee in his department and be tried and removed upon evidence and such removal be sustained by the courts."

We are of the opinion that flagrant dishonesty in the matter of obtaining credit on the strength of one's civil

service position and the failure and refusal to pay one's just debts certainly constitutes conduct unbecoming a civil service employee in any department of the public service, as much so as various other forms of misconduct and personal delinquency. To deliberately obtain credit and then to refuse to meet the obligation incurred, on the mere ground of the immunity which one's civil service position in the public service affords him, smacks of dishonesty and to such a situation must apply the old legal maxim "*falsum in uno falsum in omnibus*." We believe, therefore, that such obvious dishonesty would warrant the adoption by the department of a rule that wrongful failure and refusal of a civil service employee of the department to pay a just and legal obligation shall constitute conduct unbecoming an employee of the department and be cause for removal from the civil service upon written charge of a violation of such rule preferred against such employee before the Civil Service Commission. If such rule be adopted by the department the same should be printed and promulgated as a rule which would thereafter be binding upon the employees of such department; and in any case where the head of the department deemed the facts sufficient to warrant and sustain a charge of the violation of such rule a formal charge thereof in writing can be made and filed before the Civil Service Commission for proper proceedings therein.

We believe that our conclusion here stated is fully sustained by the Civil Service Act and the decisions of our courts. It is for the Civil Service Commission, as empowered by the Civil Service Act, particularly section 12 thereof, to determine what shall constitute cause for the removal of one from the civil service. *Kammann v. City of Chicago*, 222 Ill. 64, 65; *Heaney v. City of Chicago*, 117 Ill. App. 405, 411; *Joyce v. City of Chicago*, 120 Ill. App.

398, 404; *Joyce v. City of Chicago*, 216 Ill. 466, 473, and *Sullivan v. Lower*, 234 Ill. 21, 23.

In *Kammann v. City of Chicago*, 222 Ill. 64, on page 65, it is said:

“Section 457 of Chapter 24, Hurd’s Revised Statutes of 1905, provides that employees in the classified civil service may be removed for cause if found guilty upon an investigation of written charges before the civil service commission to conduct the examination, the finding and decision of such officer or board being subject to the approval of the commission. The statute is silent as to what constitutes ‘cause.’ Manifestly the right to determine that question is left with the civil service commission, and we have held that this statute does not require the commission to specify, in written rules, every case which shall be deemed cause for removal. *Joyce v. City of Chicago*, 216 Ill. 466.”

A similar opinion is that of *Heaney v. City of Chicago*, 117 Ill. App. 405, 411. To the same effect is *Sullivan v. Lower*, 234 Ill. 21.

In the case of *Joyce v. City of Chicago*, cited by the Supreme Court, *supra*, it is said on this point (p. 473):

“It is finally contended that the plaintiff in error could not be tried by the commission and removed from office for the offense with which he was charged, as it is said the commission had passed no rule or rules, under sections 4 and 5 of the City Civil Service Act, making the offense with which he was charged a ground for removal. Section 4 provides the commission shall make rules to carry out the purposes of said act and for examinations, appointments and removals in accordance with its provisions, and section 5 provides for the publication of such rules and when they shall take effect. We do not understand the rules in section 4 with reference to removals refer to the grounds upon which removals by the commission may be based. The grounds of removal are found in section 12 of said act, where it is provided that removals ‘for cause,’ upon written charges after an

opportunity to be given to the accused to be heard, may be made by the commission. It would, we think, in a city like Chicago, where the classified civil service embraces many hundreds of persons, greatly hamper the commission in the administration of the City Civil Service Act to require it, in advance, to specify in written rules every case which should be deemed cause for removal, and the statute should not be held to require it so to do unless such requirement is plain. The charge filed in this case, if true, shows conduct of the plaintiff in error 'unbecoming a police officer' and which clearly rendered him unfit to act as a lieutenant of police in the City of Chicago, and was cause for and justified his removal from such office by the commission.'

Whether the facts in any case warrant the charge must be determined first by the department head and then by the Civil Service Commission.

(No. 6388—March 27, 1929—F. J. V.)

CIVIL SERVICE, APPLICATION FOR ENTRANCE.

Applicants for civil service positions may be questioned by way of sworn application as to his or her physical and mental condition in the manner prescribed by leading insurance companies in their applications for insurance; such application may provide for the taking and submission of urinalysis and blood test, but applicants cannot be required, as a condition to their entry into public service under the Civil Service Law, to consent to annual physical examinations and to follow dietetic or medical treatment and to agree to an automatic dismissal from service and waiver of all benefits accruing from pension laws if his or her answers relative to physical or mental condition prove to be untrue.

To the Honorable, the Civil Service Commissioners of the City of Chicago:

There was recently submitted to us for an expression of our opinion thereon a tentative letter to the Civil Service Commission proposing for adoption and administration by the Commission the plan therein stated to be "for the protection of the several pension funds created for the benefit of those employed by the City and their families, as well as to advance the individual public service of employees."

We have carefully studied the suggestions in the light of the Civil Service Act, the Pension Act and the Municipal Employees' Benefit Act for an opinion on the law involved rather than as a matter of administrative policy.

After enumerating the various benefits provided by these acts, namely, health and accident insurance, old age and disability pensions and annuities to dependent widows and children of deceased employees, the letter suggests that:

"To protect these several funds from premature demands now frequently made upon them with the resulting unnecessary depletion of the funds, safeguards should be adopted similar to those now in use by insurance concerns carrying the same class of risks. These safeguards are twofold, viz.:

"a. Rigid medical examination, covering physical and mental condition, made prior to the future applicant becoming entitled to appointment into the public service.

"b. Annual medical examination of future appointees to correct conditions threatening the health or life of the individual through the arrest or cure of systemic disorders and incipient progressive diseased conditions."

Much that follows in the letter is devoted to a statement of the facts and existing conditions affecting these funds, and to an argument in support of the plan suggested. Then we come to the concrete proposal or the specific recommendations made to the Civil Service Commission for adoption as a permanent system to be hereafter adhered to in the administration of all the Civil Service, Pension and Benefit Acts applying to all employees in the public service. These recommendations are made in the form of eight specifications.

Number One submits a series of questions to be included in the sworn application for entrance into the civil service. These questions seek to establish the physical and mental condition of the applicant and are such questions as are usually found in the forms prescribed by the leading insurance companies in applications for insurance.

Number Three provides that a urinalysis shall be taken and a report made thereon as a part of the application.

Number Four provides that where the applicant has had a venereal disease a blood test be made a part of the medical report.

These three recommendations may properly be adopted and applied as a legitimate part of the civil service examination, and no doubt to a certain extent they are already applied by the Civil Service Commission as a test of applicants for place in the public service.

Section 6 of the Civil Service Act which pertains to the scope and purpose of examinations of applicants for office or places in said classified service, provides as follows:

“All applicants for offices or places in said classified service, except those mentioned in section 11, shall be subjected to examination, which shall be public, competitive and free to all citizens of the United States, with specified limitations as to residence, age, health, habits and moral character. Such examinations shall be practical in their character, and shall relate to those matters which will fairly test the relative capacity of the persons examined to discharge the duties of the positions to which they seek to be appointed, and shall include tests of physical qualifications and health, and when appropriate, of manual skill.”

Numbers Two, Five, Six, Seven and Eight of the recommendations submitted in the annexed letter under consideration are questionable, under the foregoing provision of section 6, as to their legal and proper application to civil service examination of applicants for employment in the public service. Our first observation is that the proposed system and the recommendations for its establishment and administration have for their principal purpose “the protection of the several pension funds created for the benefit of those employed by the City and their families.” To us it seems that the burden of the proposal here made is primarily to test the physical and mental fitness of the applicant for life insurance, pensions, annuities and participation in municipal benefit funds; and that in the system and recommendations suggested, the

primary purpose of the civil service examination is subordinated and limited thereby, which purpose, as stated in said section 6, is to "fairly test the relative capacity of the persons examined to discharge the duties of the positions to which they seek to be appointed and shall include tests of physical qualifications and health, and, when appropriate, of manual skill." The provision in section 6 that the Civil Service examination "shall include tests of physical qualifications and health" is for the purpose of securing capable and efficient service from the applicants, and not so much for the purpose of testing their qualifications for pensions, annuities and other funds, which in our opinion are secondary and incidental to the Civil Service Act and the classified public service thereby created.

Numbers Two, Five, Six, Seven and Eight, in our opinion, tend only to qualify or disqualify the applicants in the Civil Service examinations for the pensions, annuities and funds provided by the Pension Act, and the Municipal Benefit Fund Act, and may therefore be questioned in their application to these examinations as a test for employment in the classified civil service under the Civil Service Act. More specific objections to recommendations Numbers Two, Five, Six, Seven and Eight, may be stated as follows:

Number Two provides that substantially the following agreement shall be made a part of the affidavit of the applicant, to wit.: "I hereby agree that the falsity of any answer in this application shall be deemed a fraud and misrepresentation on my part and shall bar the right to recover either salary from the City of Chicago or any benefits from any pension fund for City employees during any period of disability or retirement from the service if the physical or mental condition so misrepresented is

or becomes the cause of such disability or retirement within five years from the date of my appointment; and if such disability be of a permanent nature I agree that my appointment may be vacated and set aside for fraud."

Number Five provides that the sworn statement of the applicant respecting the existence of certain diseases and physical and mental conditions shall constitute warranties that "shall be in force and effect for a period of five years from the date of said formal statement and render his appointment void for fraud and misrepresentation if untrue."

Recommendation Number Six requires as a part of the application "that the applicant consents to be examined annually while in the service, by a physician designated by the Health Department of the City of Chicago, and to procure dietetic or medical treatment as may be recommended, or as a physician engaged by the employee himself may deem necessary." This recommendation further provides that such annual examination shall be without cost to the applicant and "that refusal on his part to be examined and to procure any treatment for diseases reported to him would constitute grounds for dismissal from the service."

The foregoing requirements for qualification into the classified civil service are not warranted by, and, as we believe, are in excess of and contrary to the requirements of the Civil Service Act as a test for entrance into the public service. It is our opinion that the applicant cannot be required to enter into any such contract as a condition precedent to his entry into the public service under the Civil Service Act. It also is our opinion that under the Civil Service Act and the decided cases the only procedure by which a civil service employee may be removed from his position is by written charges and a trial had

thereon before the Civil Service Commission. We do not think, therefore, that the provision in recommendations numbers Two, Five and Six for the automatic removal of one in the civil service upon the condition subsequent that his examination statements may prove untrue can be sustained under the present law. Nor do we believe that the provision in recommendations Six, Seven and Eight for compulsory annual examination and especially the provision that the civil service employee's refusal to submit to examination shall constitute grounds for dismissal from the service are warranted by the Civil Service Act. Such provisions come within the purview of the Pension and Municipal Employees' Benefit Fund Acts and not within that of the Civil Service Act.

It is proposed to submit the system and recommendations outlined in the annexed communication to the Civil Service Commission for adoption and administration. As already stated we do not believe that this comes within the purview of the Civil Service Act, nor is it within the grant of power to the Civil Service Commission to adopt such system and rules. Section 4 of the Civil Service Act expressly provides that "said Commission shall make rules to carry out the purposes of this Act, and for examinations, appointments and removals in accordance with its provisions, and the Commission may, from time to time, make changes in the original rules." We do not think that the proposed rules for protecting the pension and benefit funds are authorized by this section 4 of the Civil Service Act.

As heretofore indicated the suggestions made are primarily matters coming within the scope of the Pension Acts and the Municipal Employees' Benefit Fund Act and are therefore controlled by the provisions of those Acts. We do not believe the suggestions here made can

lawfully be adopted as a part of the civil service administration without legislative amendment of said Act or amendments of the Pension and Municipal Employees' Benefit Acts. It is likely that the courts would construe as *in pari materia* all three of the Acts above named, but even in this view of the law we do not believe there is anything to be found in either the Pension Acts and the Municipal Employees' Benefit Fund Act or the Civil Service Act that would warrant the adoption of the suggested system of civil service examination.

As a matter of policy with respect to promoting and improving the administration of all the laws here involved the recommendations here made seem to commend themselves favorably, but the law as it is at present makes this impossible, and requires amendment either of the Civil Service Law or of the Pension Acts and Municipal Employees Benefit Fund Act.

(No. 6389—March 27, 1929—W. W.)

1 CONTRACTS, AWARD, DISCRETION.

Public officers have a certain reasonable discretion in determining a bidder's responsibility, and may inquire into and consider how the bidder has performed other contracts of a similar nature and may reject a bid of a bidder who has proven himself unreliable although he might be the lowest bidder and financially responsible.

2 WORDS AND PHRASES.

The phrase "lowest responsible bidder" means not only that the bidder must be the lowest in price and financially able to perform the contract, but also that he have the necessary skill, judgment and integrity to faithfully carry out his agreement.

Mr. Paul Gerhardt, City Architect:

In a recent conference you advised us that you were having trouble with a certain contractor who had erected some buildings for the City and who is now the lowest bidder on several contracts for the erection of other buildings of similar kind. This contractor's work, although structurally sufficient, is "botchy" and does not have the neat appearance that a first class satisfactory job should present. You do not wish him to have any more work for the reasons stated, but you are confronted with the fact that he is nearly always lowest bidder and is of unquestioned financial rating.

You desire our opinion on the proposition whether or not the Commissioner of Public Works can refuse to award him any more jobs notwithstanding the fact that he is financially responsible and submits the lowest bid.

Under the ordinances the Commissioner of Public Works must let the contracts for the buildings in question to

the "lowest reliable and responsible bidder." The problem before us, is this: Is a contractor to be considered as responsible, in the sense the ordinances intend, when his past work for the City has been unsightly and unworkmanlike, although structurally sufficient and according to the specifications he being financially responsible and able to carry out the contract for which he submits the lowest bid?

The general trend of the decisions on this question favors broadening the scope of the term "responsible." Therefore when the Commissioner of Public Works is compelled to let a job to the "lowest reliable and responsible bidder," he is allowed a reasonable discretion in determining the bidder's "responsibility." He is allowed not only to satisfy himself as to the bidder's financial responsibility, but may inquire into and consider how the bidder has performed other jobs of like character and may make use of the information thus obtained to determine whether or not this particular contractor should have a particular job.

In the case of *Hallett et al. v. City of Elgin et al.*, 254 Ill. 343, the City of Elgin refused to award a paving contract to the Standard Paving Company because the city officials had inspected and investigated certain work done by that company and found it to be unsatisfactory and therefore refused to award the Standard Paving Company the job although that company submitted the lowest bid. Another company obtained the job on a higher bid. Whereupon the Standard Company sought to restrain by a bill in chancery, the City of Elgin from making payments under the contract. The Circuit Court dismissed the bill and the Supreme Court of Illinois affirmed the lower court. In an opinion which reviewed the authorities at great length the court said:

"It is also held that the statutory requirement that contracts for public improvements shall be let to the lowest responsible bidder does not require the letting of a contract to the lowest bidder upon the ascertainment of his financial responsibility only, but the term 'responsible,' includes the ability to respond by the discharge of the contractor's obligations in accordance with what may be expected or demanded under the term of the contract * * *."

McQuillin in his authoritative work on Municipal Corporations in section 1330 says:

"Generally the provision is that the contract shall be awarded to the 'lowest responsible' bidder, and this means the lowest responsible one who complies with all the requirements of the statute and the specifications. While it has been adjudged that it also means the lowest one who is pecuniarily responsible, it is generally held to mean not merely the lowest bidder whose pecuniary ability to perform the contract is deemed the best, but the bidder who is most likely, in regard to skill, ability and integrity, to do faithful, conscientious work, and promptly fulfill the contract according to its letter and spirit. Accordingly the requirement that the contract shall be let to the 'lowest responsible bidder' does not require the letting to the lowest bidder upon ascertaining his financial responsibility only, but the term 'responsible' includes the ability to respond by the discharge of the contractor's obligation in accordance with what may be expected or demanded under the terms of the contract. 'The lowest responsible bidder,' 'must be held to imply skill, judgment and integrity necessary to the faithful performance of the contract, as well as sufficient financial resources and ability,' and this is the sense 'in which it has long been interpreted by courts and text writers.'"

We are therefore of the opinion that since this particular contractor had erected buildings for the City in the past which were so unsightly and unworkmanlike, as you have stated, that a reasonable man, skilled in building matters, would conclude that he would likely erect

other buildings in the same unsightly and unworkmanlike manner, then you are justified in rejecting his bids on any future contracts notwithstanding the fact that he is financially able to carry out the same.

(No. 6390—March 28, 1929—W. W.)

CONTRACTS, PERFORMANCE, COMMISSIONER OF PUBLIC WORKS.

The Commissioner of Public Works under section 3263 of the Municipal Code has authority to fix upon a small sum that would be necessary to fully complete a building found to have slight defects which are difficult of remedy, and may deduct such amount from the contract price and authorize payment of balance.

Mr. Paul Gerhardt, City Architect:

In a recent letter you state that a sum of money allocated for payment to a certain contractor for City buildings, amounting to \$7,307 is being withheld pending final acceptance of the jobs. The buildings are complete for all practical purposes but there exist some slight deficiencies in the completed jobs. From the facts as set out in your inquiry it seems that it is impractical to fully complete this work on account of certain conditions, not necessary to recount here. The deficiency of completion amounts in terms of money, according to your judgment, to the sum of \$307 out of a total contract price of \$48,107. You wish to know if the Department of Public Works may offer this contractor the said \$7,307 now withheld less the deduction of \$307 above mentioned in full settlement of the City's obligation under the contract.

What the Commissioner of Public Works is to do in this situation is governed by section 3263 of the Municipal Code of Chicago, which reads in part as follows:

“All such contracts shall also state that in case of improper construction, or of noncompliance with the contract in any manner whether the same is determined by the said commissioner or by arbitration, the said commissioner shall have the right to suspend such work, or such furnishing of materials and supplies, at any time or to order the partial or entire reconstruction of such work if improperly done, or to declare the contract forfeited, and to relet the same without further advertisement; and to adjust the difference of damages or price, if any, which the contractor, failing to properly construct such work, or furnish such materials or supplies, in such cases of default, should pay to the city, according to the just and reasonable interpretation of said contract.”

We are therefore of the opinion that the Commissioner of Public Works has the authority to adjust the difference in damages or price with the contractor and to deduct the sum of \$307 from his balance. If the contractor accepts this deduction you have full authority to pay him the sum of \$7,000 in full settlement.

(No. 6391—March 28, 1929—J. R.)

DAMAGES, FLOODING OF BASEMENT, CITY NOT LIABLE.

The City is not liable for damages claimed to have been sustained by reason of the overflowing of a basement from a water leak and the bursting of a water main where the City authorities use every possible means to repair the main after receipt of notice and where the water main is presumed to have been properly laid or installed.

Hon. John S. Clark, Chairman, Finance Committee:

You recently submitted to this office for an opinion the claim of Goldblatt Bros., 4700 South Ashland avenue, for damages done to their merchandise located in their basement as a result of flooding the same due to the bursting of a water main.

From our investigation and reports from the Water Pipe Extension Division, we find that on Sunday, September 17, 1928, the Central District of the Water Pipe Extension Division received a call about 8:30 a. m. from Goldblatt Bros., that there was a water leak coming into their basement, and at about 9 a. m. a repair crew was on the premises and proceeded to make a water shut-down and repair the damaged water main, as well as pump the water out of the basement.

The leak was not caused by any negligence on the part of the City, and the City, through its agent, after being notified of the conditions, used diligence in making repair of the main. The mere fact that the water main broke would not of itself create a liability against the City, as this main was at a considerable depth below the surface of the street. The physical impossibility of making inspection of pipes laid at such a depth below the surface

would or could not make it necessary for the City to make inspection. These pipes have been in for a considerable length of time, and the presumption would necessarily arise that they were properly installed when they were first laid. McQuillin on Municipal Corporations, vol. VIII, page 8287, states:

“In all sewer or water main cases cited by the plaintiff in which the city was held liable there was either evidence of actual negligence in the construction or operation of the water main or sewer, or notice to the city authorities of the break or overflow, accompanied by neglect on their part to repair promptly, or actual notice by reason of like prior occurrences that the sewer or pipe were defectively constructed or maintained. * * * A municipality is not an insurer of its water or sewer system any more than of its streets. It is required only to use reasonable care in establishing and maintaining such a system.”

It will be noted from the investigation of this matter that the Water Pipe Extension Department repair crew, used due diligence in making shut-down and repairing the damaged water main.

We are, therefore, of the opinion that the City is not liable for the damages claimed, and the claim should be denied.

(No. 6392—March 28, 1929—R. N. L.)

1 INSPECTION, ILLUMINATING BULLETIN OR BILLBOARDS.

Under present ordinances there is no provision for the inspection of illuminating bulletin or billboards erected and displayed on vacant property and the payment of fees therefor.

2 MUNICIPAL CODE OF 1922.

Sections 914a, 919a and 919c of the Municipal Code of 1922 do not cover electric illuminating bulletins or billboards erected and displayed on vacant lots.

Hon. George K. Schmidt, City Comptroller:

Your letter of recent date relative to the warrants for collection by the Department of Gas and Electricity against the General Outdoor Advertising Company for electrical inspection of illuminated bulletin boards, has been referred to me for reply.

Your inquiry, we understand, covers billboards which are nearly in all cases within the lot line, not projecting on City property, and usually lighted by electrically illuminated reflectors.

Section 914 of the Chicago Municipal Code of 1922, page 277, provides that:

“(a) The fee to be charged for permits issued for the erection or construction of billboards or signboards or for the alteration thereof shall be five dollars for each twenty-five lineal feet of billboard or signboard erected or altered. An annual fee of one dollar for each twenty-five lineal feet of billboard or signboard or fractional part thereof shall be charged every person, firm or corporation as owner or in possession, charge or control of any billboard or signboard for inspection of such billboards or signboards; provided, however, that where such signboard does

not exceed sixty-five square feet in area and is attached to the surface of a permanent building in accordance with the provisions of section 903 and is designed to give publicity to the business carried on within such building, and no part of said sign is more than eighteen feet above the average inside grade at the front of the building, no fees for erection or inspection shall be charged; but not more than one sign of sixty-five square feet shall be allowed for each twenty-five lineal feet of frontage, unless the fees for erection and inspection are paid as herein provided for."

The fees for such inspection are collected by the Commissioner of Buildings, and no mention is made of the electrical appliances which are attached to these boards.

By section 919 of the Chicago Municipal Code of 1922, page 279, it is provided that:

"(a) Illuminated and other roof signs regulated by this section shall be defined as signs constructed, erected and maintained upon or over the roof of any building, which have all or any part of the letters, of which said signs may be constructed, either in an outline of incandescent lamps, or which have painted, flush or raised letters where the face of the sign presents a surface to be affected by wind pressure not in excess of the requirements hereinafter contained; or signs having a border of incandescent lights attached thereto and reflecting light thereon; or transparent glass signs where they are lighted by electricity or other illuminant. Every such sign, as hereinabove described, shall be constructed with steel skeleton construction so as to present a surface to be affected by wind pressure which shall not exceed fifty per cent of the face of the sign. No illuminated roof sign shall be erected or maintained upon or over the roof of any building unless the framework thereof shall be entirely of metal or some other equally incombustible material, and no material, except such material as is used for insulating wires and conductors, which is less combustible than metal, shall be used in, on or about, or comprise a part of any illuminated roof

sign, except that the material to which the framework of any such sign shall be anchored may be substantial beams anchored or securely fastened to the roof or walls of the buildings upon or over which any such sign is erected."

Paragraph "c" of said section 919, covering the fees for inspection reads as follows:

"Any person, firm or corporation desiring to erect or maintain an illuminated roof sign, as described in this section, shall pay to the city, to cover the cost of inspection and approval by the commissioner of buildings of the plans and specifications of such sign when erected, a fee of fifty dollars for the first five hundred square feet of superficial area of such sign or fractional part thereof, and five cents for each additional square foot. For each annual inspection of an illuminated roof sign by the commissioner of buildings, subsequent to the first inspection, there shall be paid a fee of fifty dollars for the first five hundred square feet or fractional part; five cents additional for each additional square foot area over five hundred square feet. In addition to the fees herein required to be paid for inspection, there shall be paid by the owner or person having charge or control of any illuminated roof sign, as herein described, an annual inspection fee to cover the cost of such inspection which shall be made by the commissioner of gas and electricity, whose duty it shall be to cause such annual inspection to be made, and such fee shall be at the rate provided by the ordinances of the city."

You will note that inspection fees of the Commissioner of Gas and Electricity according to the ordinances cover illuminated and other roof signs, and do not cover billboards on vacant property.

It will be necessary to have the ordinance covering billboards amended so as to make a part of same the inspection by the Commissioner of Gas and Electricity where electric illumination is used. Therefore, in our opinion these warrants which have been issued against the Gen-

eral Outdoor Advertising Company for electrical inspection of illuminated bulletin boards cannot be collected under the ordinance.

(No. 6393—March 28, 1929—G. F. M.)

FIREMEN'S PENSION, DISABILITY, RETIREMENT.

Retirement on account of disability is permissible only while a fireman is in active service or on leave of absence.

Board of Trustees, Firemen's Pension Fund:

Complying with your request for an opinion as to the pension status of Andrew R. Case, the following is submitted:

The papers and records submitted in this matter show that Andrew R. Case was born September 23, 1882, and was appointed in the fire service on September 1, 1907; that on October 24, 1928, he applied for a pension on account of disability which application was denied on January 8, 1929; that on January 8, 1929, Mr. Case applied for a pension on account of service, having been a member of the Fire Department for more than twenty years; that the resignation of Mr. Case from membership in the Fire Department was accepted to take effect on February 7, 1929; that on February 13, 1929, application for pension on account of service was granted by your Honorable Body "subject to the provisions of section 8"; and that Mr. Case has been employed as a sergeant of police at La Grange, Illinois.

Section 8 of the Firemen's Pension Act provides, among other things, as follows:

"Any fireman of any such city, after having served twenty (20) years as a fireman, of which the last five (5) years shall be continuous, may retire from active service, and when such retired fireman shall have reached the age of fifty (50) years the board shall order and direct that such fireman shall be paid a monthly pension equal to one-half the amount of monthly salary attached to the rank which he may have held in the fire service at the date of his retirement: *Provided*, that the retired fireman has remained in good standing by paying to the treasurer of the board all his monthly contributions from the time of his retirement until he shall have reached the age of fifty (50) years as required by this Act: *Provided, further*, that the pensions so paid shall not exceed the sum of three thousand (\$3000.00) dollars per annum, nor be in any case less than six hundred (\$600.00) dollars per annum."

It appears from the documents submitted in this matter that Mr. Case is not disposed to make payments as required under section 8 but has requested that he be given an opportunity to renew his application for retirement on account of disability. This can not be done at this time because Mr. Case is no longer a member of the Fire Department and disability payments are payable under section 9 of the Act only to firemen while in active service or on leave of absence.

As to whether or not Mr. Case would be entitled to be retired on disability pension under section 9, in the event he withdrew his resignation and was restored to active membership in the Department, is a matter that can not be determined at this time as it would depend entirely upon the question as to whether or not Mr. Case, while in active service or on leave of absence, became and is so physically or mentally disabled as to render necessary

his retirement from active service. This is a question of fact and would require proof of two distinct matters, namely:

1. That Mr. Case, while in active service or on leave of absence became and is physically and mentally disabled.

2. That his physical or mental disability is of such a character as to render necessary his retirement from active service.

While the documents presented in this matter indicate that Mr. Case is suffering with a defect in his left eye, there is nothing presented to establish the fact that this defect occurred while Mr. Case was in active service or on leave of absence, as required in section 9 of the Act.

It further appears as hereinbefore stated that Mr. Case has been and is now serving as sergeant of police in La Grange, Illinois, which fact in itself would seem to render necessary some evidence to show that while capable of performing police duty Mr. Case is not capable of performing fire duty.

I am of the opinion that Mr. Case will have to do one of three things, namely:

1. Retain his present status of a fireman retired under fifty years of age and continue to make the payments provided for in section 8; or,

2. Withdraw his resignation and be restored to active service as a fireman and continue to work as a fireman until he attains the age of fifty years; or,

3. Having had himself restored to active service, make proof of his right to a disability pension under section 9 as hereinabove indicated.

(No. 6394—March 28, 1929—G. F. M.)

POLICE PENSION, CHILD UNDER 18 OF WIDOW WHO MARRIES.

Upon the marriage of a widow who has been, in receipt of a police pension, and also a child's pension, her pension ceases and the child's continues.

Retirement Board, Policemen's Annuity and Benefit Fund:

Replying to your request for an opinion as to payment of a child's pension under the Act of 1915, the following is submitted:

Your letter states that in 1919 a pension of \$10 per month was awarded to Richard T. Thompson, Jr., son of Richard T. and Anna Thompson, together with a pension to Anna Thompson, as widow of a deceased policeman; that on August 18, 1921, Mrs. Thompson married William R. Ahrens; that the office discontinued the widow's pension (of \$10 per month) and also the child's pension; that an investigation on the part of your office disclosed that the child is living with his mother and stepfather; that there is to be made a back payment amounting to \$890.00 running from September 1, 1921, to January 31, 1929, less an overpayment to the widow of \$10 or a net payment of \$880.

Your question is as to whom should payment for the child be now made. The Police Pension Act of 1915 was amended in 1917 to provide that each child of a deceased policeman should receive a pension as provided in section 3 of the amendatory act of 1917.

The same amendatory act provides that in case the widow of any policeman shall marry, the pension granted her shall at once cease and determine, but as there is no

provision terminating the pension payable on account of the child, it was error to have discontinued the payment of \$10 per month on account of the child when the mother remarried in August of 1921.

Section 5 of the said amendatory act provides that whenever a widow of a policeman is paid a pension pursuant to section 5 then and in that event "each child of such deceased or insane policeman shall receive a pension as provided in section 3 of this Act."

Paragraph B of section 3 of the Act provides for the payment of pensions for children under two classifications as follows:

1. When the widow is being paid a pension.
2. When the policeman leaves no widow surviving or when the widow dies before the children arrive at the age of eighteen years.

As Mrs. Thompson, the widow of the policeman and mother of the child in question is still living, the pension payable on account of the child would be payable under classification 1, which provides for the payment of a pension to the widow "and an additional sum of \$10 per month for each child under eighteen years of age."

The only provision in section 3 of the amendatory act of 1917 relative to the payment of a pension direct to children is classification 2 hereinabove referred to where both the father and mother are dead.

I am of the opinion that as long as the widow of a policeman survives, any pension payable on account of any minor child or children of such policeman, under the provisions of the Police Pension Act of 1915 as amended in 1917, is to be paid to the mother of such child or children; and that in the instant case the pension payments heretofore withheld in error are to be paid to the mother of the child.

(No. 6395—April 2, 1929—L. H.)

1 FOREIGN INSURANCE COMPANIES, NET RECEIPTS,
RETURN.

The return of foreign insurance companies for assessment purposes on Tax Commission Form No. 16 is limited to direct business. It must include all of business done less administration expenses. Insufficient returns should be rejected as no return and assessment made by estimate with penalty, or a return should be compelled by writ.

2 FOREIGN INSURANCE COMPANIES, NET RECEIPTS,
ASSESSMENT.

The net receipts as returned should be valued and equalized on a parity with equalized valuations of property, the general equalization of net receipts being 60 per cent of the full amount.

3 FOREIGN INSURANCE COMPANIES, NET RECEIPTS,
DEDUCTIONS.

Claims to deductions made on the returns should be disallowed and appeals from denials should be taken to the Supreme Court through the Tax Commission.

Hon. William H. Malone, Chairman, State Tax Commission:

We call attention to the action taken by the Tax Commission in 1924, when, following the decision in the *Barratt case*, instructions were given to assessors and reviewing boards governing assessments of net receipts under section 30 of the Insurance Act of March 11, 1869. Since 1924 several decisions have been made by the courts, and it is necessary that new instructions shall be issued by the Tax Commission in order that the current and future assessments shall be correctly made. Therefore, we make the following suggestions:

A decision in the *Baltica case* relating to reinsurance requires a slight change in Tax Commission Form No. 16 to limit the return to direct business.

A recent decision of the Federal Court holds that Lloyds are to be viewed not as individuals but as associations doing an insurance business. This permits a change so that the return under Form 16 shall apply to business done by Lloyds of other States. The words "Issue of 1929" should be placed on the form.

Directions should be given so that assessors and reviewing boards shall enter an assessed and equalized valuation of the net receipts in accordance with the final opinion in the *Hanover case*.

The rulings in the *Barrett case* that returns upon Tax Commission Form No. 16 shall be required, that all of the business done shall be returned, and that only expenses administered by the agent and retained by him shall be deducted, are unquestioned by any action taken to the Supreme Court, the *Fayart case* having been dismissed in the February term of 1929. In these particulars the former instructions of the Tax Commission stand without need of change.

We attach hereto a copy of Form 16 with the required changes indicated therein. Also, we submit rules for making assessments of which a copy has been furnished to the Board of Assessors and Board of Review. We request a hearing at an early date and suggest that each board be invited to attend. The Board of Review is proceeding in accordance with the rules.

The following is our suggestion as to the rules to be observed by Assessors and Boards of Review in making assessments of net receipts under section 30 of the Insurance Act of March 11, 1869:

Alterations in Tax Commission Form 16. On the back of Form No. 16 and under that heading place the words "Issue of 1929." In the first sentence of the first paragraph of the "INSTRUCTIONS" strike out the words "reinsurance or" preceding the words "direct insurance," and in the second sentence of the same paragraph add the letter "n" to the word "show" changing it to "shown." In the last paragraph on the back of the form printed in capital letters strike out the word "GOVERNMENT" before the word "LLOYDS."

Returns of Net Receipts. Demand shall be made for a return upon Tax Commission Form No. 16, Issue of 1929. Any return not made strictly in compliance with the instructions in said form shall be rejected as no return, and the assessment shall be made by estimate with penalty as provided by statute, or a writ shall be sought to compel a return upon said Form No. 16.

Assessment of the Net Receipts. The amount summarized in a true return upon Tax Commission Form 16, Issue of 1929, as "Total Gross Premiums Less Total Returned Premiums and Total Op. Exp." shall be taken as the full amount of the net receipts to be valued and equalized on a parity with equalized valuations of property. Sixty per cent of the full amount of the net receipts has been adopted by the Tax Commission for effecting a general equalization of such net receipts. Entries of net receipts shall be made on the tax lists apart from entries of property and under a heading "Net Receipts." Sheets thus filled with entries may be bound separately, if desired.

Claimed Deductions. Any claims to reductions made in returns upon Form 16 shall be overruled and appeals from such denial of claims shall be taken to the Supreme Court through the Tax Commission as provided by statute.

We attach hereto copy of suggested rules, also copy of Form 16 as amended by our suggestions.

(No. 6396—April 2, 1929—L. H.)

1 DOMESTIC INSURANCE COMPANIES, ANNUAL STATEMENT, ASSESSMENT.

The annual statement filed by domestic insurance companies shows the exact amount of total assets and liabilities and may be used as a basis of valuation for assessment purposes.

2 DOMESTIC INSURANCE COMPANIES, RETURN.

Office equipment and supplies of a domestic insurance company are returnable as an item additional to the values shown in the annual report.

3 DOMESTIC INSURANCE COMPANIES, PERSONAL PROPERTY OR CAPITAL STOCK, ASSESSMENT.

In assessing the real and personal property of a stock company there should be an assessment of the additional value of the capital stock by taking the percentage of the reserve deducted as liability as a basis. In assessing mutual companies and associations without capital stock the assessors and boards of review should place the assessment of the companies on a parity with assessments of those with capital stock.

Hon. William H. Malone, Chairman, State Tax Commission:

Prior to the completion of the assessment of 1927 an investigation disclosed the fact that a large total of taxable personal property was held by domestic insurance companies and associations of which only an insignificant amount had been assessed. A complaint was filed with the Board of Review together with information copied from annual reports of the State Insurance Department. The resulting assessment shows a satisfactory total made up of a body of uniform and comparatively heavy assessments and a body of arbitrary and small assessments. The taxes extended upon the small assessments have been paid,

but those upon the heavy assessments have not yet been paid, and several have been contested in the courts. If the total amount assessed had been spread equitably, less cause for appeal to the courts would have been given and more taxes would have been collected. The reasons for this lack of equity are obvious: There is no proper form to guide the company or association in making a return of personal property and no understanding of what should be returned; consequently, misleading returns or misleading verbal statements are accepted at hearings and adapted as the basis of the assessment.

We attach hereto a copy of a form which we have prepared, and which the Board of Review has had printed with the intention of requiring returns to be made in compliance therewith. In order to make the return upon the form obligatory as a lawful form, it is in our opinion necessary that the Tax Commission should issue it for application throughout the State and rules should be adopted providing for a reasonable assessment based upon the information disclosed when the return is made. An incontestable assessment is one in which the basis of the assessment is clearly understood by the assessed and the application of the rules adhered to uniformly.

The requirements of a reasonable assessment of this class of property, in our opinion, are as follows:

Insurance companies and associations do business under State regulation and supervision, which necessitates the possession of an unquestionable surplus of property. Statements are made annually which show the exact amount of total assets and total liabilities and the remainder of surplus. A reasonable assessment must first adopt the annual report as a basis of the valuation to be made.

Another requisite develops from the fact that investments may be made in tax exempt securities and taxation

completely avoided. A recent decision of the United States Supreme Court holds that tax exempt securities must be deducted from the taxable surplus, so that any insurance company can by manipulating its investments to that end avoid taxation completely. The interest from tax exempt securities is less than that from taxable securities, and investment depends upon the valuation of the taxable securities for taxation. The tax rate in Chicago is about 5 per cent and a six per cent bond valued at one-half full value will net a return of one $3\frac{1}{2}$ per cent per annum so that a four per cent tax exempt bond is preferable. But an assessment of one-fifth full value would make the six per cent bond net five per cent annum and give it the preference. In a very short time there would be no personal property held by insurance companies subject to taxation unless the percentage of full value adopted as the assessed and equalized value is such that taxable securities are preferable to tax exempt securities in point of net return.

Annual reports require the deduction of reserves as a liability on a scale which exceeds the actual liability, so that percentages of the reserve are added to the surplus shown in the annual report in computing the intrinsic value of the stock of an insurance company. In our opinion the Tax Commission, in cases where the assessment of the real and personal property of a stock company has been properly made, should make the assessment of the additional value of the capital stock by taking a percentage of the reserve deducted as liability as the basis. In the case of mutual companies and associations without capital stock the same action should be taken by assessors and boards of review to place the assessment of companies without capital stock on a parity with the assessments of those with capital stock.

Annual reports treat investments in office equipment and supplies as expenditures and such items are not listed among the admitted assets. This necessitates the return of the value of office equipment and supplies as an item additional to the values shown in the annual report.

The attached form for making returns and proposed rules are based upon the requirements stated above as necessary to a reasonable assessment.

We request a hearing at a very early date and suggest that an invitation to be present be mailed to the insurance companies that are subject to assessment on capital stock by the Tax Commission and to the Board of Assessors and Board of Review of Cook County.

(No. 6397—April 11, 1929—F. J. V.)

RECEIVERS, CIVIL SERVICE EMPLOYEE'S SALARY, PAYMENT TO.

A receiver appointed in a suit in which a civil service employee alone is involved has no power or authority to demand or receive the civil service employee's salary from the City disbursing officers.

Hon. George K. Schmidt, City Comptroller:

We have your recent communication in reference to the delivery to a receiver of the pay check of Dennis J. Lamb, who is a lamp repairer in the Electrical Department of the classified civil service of the City of Chicago. It seems that three pay checks, each for \$107.61 had already been delivered to such receiver upon his demand therefor. You submit with your communication the protest of Mr.

Lamb's attorney to any further delivery of such pay checks, and a statement that "you and the City of Chicago will be held responsible in the matter."

The receiver referred to is Louis H. Silver, who appears to have been duly and regularly appointed by the Circuit Court in the pending case of *Mary J. Lamb v. Dennis J. Lamb*, as shown by transcript of the orders of said court in said case, also attached to your communication.

We are of the opinion that this receiver is in no better position under the law to demand and collect the salary and the wages of this civil service employee engaged in the public service of the City of Chicago than an assignee of such wages and salary.

We have had occasion to render opinions in the matter of the assignment of such wages and salary and the demand upon the City's department heads for the payment or transfer of such pay checks of the City employees to such assignees.

It has ever been the policy of the common law to forbid the assignment by public officers and servants of their salaries and wages. Such assignments are declared to be void as against public policy. The reason for the rule is stated to be the necessity of securing the faithful discharge of official duty and efficiency in the service rendered by paying the salaries and wages to those performing the work at the times appointed for such payments. *City of Chicago et al. v. People ex rel.*, 98 Ill. App. 517; *Shannon v. Bruner*, 36 Fed. 147, 148; *Bliss v. Lawrence*, 58 N. Y. 442.

It is said in *City of Chicago et al. v. People ex rel.*, *supra*, that:

"A municipal corporation exists for the public welfare only, and it cannot be forced into a position by which its duty as to its officials in respect to their

salaries shall be not to pay them in accordance with their lawful right, but to pay the debts which they may be owing to creditors, or their stipend to those to whom they may have assigned it. *Merwin v. City of Chicago*, 45 Ill. 133; *Johnson v. Pace*, 78 Ill. 143; *Addyson Pipe & Steel Co. v. City of Chicago*, 170 Ill. 500."

Not only is such assignment of official salary and wages void as against public policy, but so, also, is an attempt to make such assignment by the indirect means of a power of attorney to receive and collect them. 4 Ann. Cas. 424, note.

Mandamus will lie to enforce the payment of salary and wages to the public officer or servant despite such assignment thereof or power of attorney to collect the same. *City of Chicago et al. v. People ex rel.*, 98 Ill. App. 517, 521.

We believe these rules are to be more vigorously applied against the assignment of the salaries and wages of civil service employees than that of others in the public service. The duties of the disbursing officer in the matter of auditing, certifying and paying salaries under the Civil Service Law and the rules of the Civil Service Commission would be well nigh impossible, if such assignments and powers of attorney to receive and collect were legal.

The receiver in this case has nothing but general authority given him under the law as to his duties. There is nothing in the orders of the Circuit Court appointing and qualifying the receiver which purports to give the receiver any power or authority whatever over the wages and salary of said Dennis J. Lamb, and in such situation the receiver is in no better position under the law to collect the wages of this civil service employee in the public service than is any other creditor or assignee. The Circuit Court has given no specific order or direction to the

receiver in the *Lamb case* to demand and collect these wages and salary, and even if there were such an order of the court the same would not be binding upon the City of Chicago or the City Comptroller, or any other of the disbursing officers of the City, for the reason that none of them is a party to such suit in which the receiver was appointed. And even if the City and its officers were made parties, we do not believe that the court, under the general law pertaining to the salaries and wages of civil service employees in the public service, could validly order the transfer or payment of such checks to the receiver in behalf of the plaintiff in the suit, no more than he could order such payment to be made to the assignee of such pay checks.

For the reasons here stated, you will deliver the pay checks to the employee, Dennis J. Lamb, who at this time, as the situation now exists, is alone entitled to receive such checks.

(No. 6398—April 12, 1929—R. N. L.)

1 VACATION, ALICE CLARK'S SUBDIVISION.

All public rights in streets, alleys, commons and public grounds in Alice Clark's Subdivision described in plat of vacation filed by Hardin in 1874 are fully divested by said plat without the consent of village trustees, such consent being unnecessary.

2 VACATION OF PLATS, VILLAGE TRUSTEES' CONSENT UNNECESSARY.

The consent of village trustees is not required to a vacation of a town plat.

Hon. John D. Riley, Superintendent of Maps:

Your letter of recent date relative to the plat of Alice Clark's Subdivision of the east half (E. $\frac{1}{2}$) of the northwest quarter (N. W. $\frac{1}{4}$) of the southeast quarter (S. E. $\frac{1}{4}$) of section nineteen (19), township thirty-seven (37) north, range fifteen (15) has been referred to me for reply.

On the plat attached the following is notated, "The above vacation is not legal not having the approval of the Board of Village Trustees."

There appears on record as Document No. 159648, Book VII of Plats, page 43, the following vacation of the above named subdivision of Alice Clark, said vacation signed and acknowledged by Isaac N. Hardin, the grantee of said Alice Clark to the entire subdivision:

"Know all men by these presents, that I, Isaac N. Hardin of the City of Chicago, in State of Illinois, being the sole owner of the east half of the northwest quarter (N. W. $\frac{1}{4}$), southeast quarter (S. E. $\frac{1}{4}$) of Section nineteen (19), Township thirty-seven (37) North, Range fifteen (15) East of the Third Principal Meridian in Cook County, and State of Illinois, do hereby vacate the subdivision of said tract of land

heretofore made by one Alice Clark and known as Alice Clark's Subdivision of east half (E. $\frac{1}{2}$), northwest quarter (N. W. $\frac{1}{4}$), southeast quarter (S. E. $\frac{1}{4}$) of said Section nineteen (19), Township thirty-seven (37) North, Range fifteen (15) East of the Third Principal Meridian and the said plat is hereby vacated and said tract of land hereby resolved in an original tract of twenty (20) acres. The said subdivision hereby vacated having been recorded in book 172 of Maps on page 66 in Cook County, Illinois, on the 23d day of November, 1870.

"Witness my hand and seal this 31st day March, 1874.

I. N. Hardin. (Seal)

"Subscribed and sworn to this 31st day of March, 1874.

Rudolph E. Schultz,
Notary Public.

"Doc. No. 159648—Book 7 of Plats, page 48."

On page 103, chapter 25, section 46 of the Statutes of Illinois, 1818-1869, the following appears, covering vacation of town plat or map:

"In all cases where persons have heretofore, or may hereafter, lay out towns, or additions to towns or subdivisions of town lots, and the plats or maps thereof shall have been recorded, they, their heirs, assigns or grantees, may, at any time before making sale of any single lot or lots, by executing a writing, and causing the same to be recorded in the office in which the plat or map was recorded, declare such map or plat to be vacated; and the execution and recording of such writing shall operate to destroy the force and effect of the recording of the plat or map so vacated, and to divest all public rights in the streets, alleys, commons, and public grounds, laid down or described in such plat or map; and in cases where any single lot, or lots, have been sold, the plat or map may be vacated, as herein provided, by all the owners of lots joining in the execution of the writing aforesaid: *Provided*, that no such writing shall be recorded until the execution thereof shall have been

acknowledged or proved, as is, or may be, required in respect of deeds." Laws 1847, p. 168.

You will note that the statute governing the vacation of town plat or map does not require the consent of any village trustees. The instrument of vacation signed by I. N. Hardin as above stated is a legal vacation of said subdivision.

On July 2, 1897, Document No. 2559611 is recorded as a dedication of a sixty-six foot (66') street by the owners of the property in question, which said dedication covers Burley avenue, which street is a part of the original subdivision. The acceptance of this dedication would be presumed as an acknowledgment on the part of the City that said street did not exist and that it was necessary to get a dedication of same from the owners and that the reason that this street did not exist was because of this deed of vacation filed by Mr. I. N. Hardin.

Therefore, in our opinion, the streets and alleys in Alice Clark's Subdivision, by the filing of the plat of vacation by I. N. Hardin as above described, operated to divest all public rights in the streets, alleys, commons and public grounds, laid down or described in said plat, and it was not necessary that the village trustees approve said plat of vacation.

INDEX

References are to pages.

A

ADVERTISEMENT FOR BIDS

Appropriation essential as condition precedent.....	230
Opening, date of	118
River straightening	118

AIR HEATING PLANTS

Registration fee, payment	427
---------------------------------	-----

ALDERMANIC NOMINATIONS

Petition, City Clerk's duty	499
-----------------------------------	-----

ALLEYS—See Dedication

Dedication, failure to tax in case of.....	3
Sherman House	3

AMUSEMENTS

Public places, closing	311
------------------------------	-----

ANNEXATION

Annexed territory	194
Ordinance in force	194
Policemen and firemen in annexed territory, status and salary	381
Revenue from annexed territory, accounting for.....	519
Revenue from annexed territory, collection and application	519

ANNEXATION ACT OF 1872

Revenue	519
---------------	-----

ANNUAL APPROPRIATION ORDINANCE—See Supplemental Appropriation

Amendment	199
Condition or string, effect	200, 491
Contingent fund, amendment	592
Designation of object, payroll	598
Finance Committee, contingent and miscellaneous expenses	605

Fire Commissioner's contingent fund, advertising films	603
Gas and gasoline lamp operation, condition.....	491
Transfer	200
APPROPRIATIONS—See Annual Appropriation Ordinance	
3-S-2 account	219
Approaches to bridge	411
Calumet Harbor fund	230
DeKoven street property, purchase of.....	42
Dependent and delinquent persons	352
Exploitation and expositions, advertisement.....	277
Lapse of	411
Law governing appropriations should be strictly fol lowed	492
Payrolls, temporary work	416
"String" attached	200, 230, 491
Temporary assignment of different work is not diver sion of	416
ATTORNEY'S LIEN	
Notice, disposition	433
B	
BOARD OF EDUCATION	
Action by City	436
BONDS	
Invalid bonds create obligation against municipality..	447
Transfer of bonds, authority for.....	449
BOND ISSUES	
Bridge repair and maintenance	274
Corporate expenses may be covered by.....	275
Current expenses may be made the subject of.....	274
BUILDINGS—See Zoning	
Building endangering life, Commissioner of Buildings, duty	318
Dangerous walls, Fire Department's duty	78
Permit, discretion in case of issuance.....	514
Permit issuance	116
Rubbish, Fire Prevention Bureau may order removal of	84
BUREAU OF MAPS	
Signature	345

C

CANAL AND HARBORS ACT

Sections 17b, 17c	1
-------------------------	---

CHICAGO CHARTER

History of	50
------------------	----

CHICAGO TELEPHONE COMPANY

Classified telephone directory, regulation	369
Franchise ordinance	369

CITIES AND VILLAGES ACT—See Canal and Harbors Act

Article V, section 1, clause 7.....	37
Article V, section 1, clause 19.....	219
Article V, section 1, clauses 66 and 78.....	18
Article V, sections 1 and 2.....	605
Article VII, section 2a	347
Article VII, section 3	266
Article VII, section 5	240
Article VIII, section 1	137
Article X	373

CITY COMPTROLLER

Annexed territory, duty as to.....	519
Payroll, approval of	240
Personal liability	253
Traction fund, duty as to.....	341

CITY COUNCIL—See Special Assessments

Claims, compromise of	74, 392
Compromise, power	287
Donations invalid	215
Memorials, appropriation for	605
Revenue	373
Streets and alleys, power over.....	88
Traffic restrictions, power	351
Waterworks system	372

CITY INSPECTOR

Railroad scales, power over	423
-----------------------------------	-----

CIVIL SERVICE

Application for entrance	628
Application, nature of information to be supplied by..	223
Appointment, persons from expired eligible list.....	563
Assistant to Division Fire Marshal.....	106

Back salary, action	532
Captain and lieutenant in Fire Department.....	32
Certification of name of deceased fireman.....	159
Change of title, temporary appointment.....	620
City Clerk's office, temporary employees.....	464
Classification, department heads' duty	416
Continuance or rehearing, waiver	549
Defunct eligible lists, appointees under.....	617
Eligible list, cancellation	148
Eligible list, certification to different departments....	209
Eligible list, Division Fire Marshal.....	148
Eligible list, omission or retention of names.....	563
Eligible list, restoration of cancelled not permitted..	126, 563
Eligible list, temporary appointment	620
Employee, discharge, back salary	532
Employee, reinstatement, back pay	450
Employees, term of office	381
Examination, limitation as to certain class unlawful..	567
Examinations, frequency	126
Failure to pay debts, department rule.....	623
Laying off employees	337
Merging positions	32
Physical and mental examination, dementia praecox...	150
Positions, classification	567
Positions, merger of, certification	209
Probationer, reinstatement or reappointment.....	536
Probationer, status	536
Regulation VII	128
Rehearing, reinstatement, rules	577
Reinstatement, back pay	329, 501, 532
Reinstatement, salary waiver	549
Rules, nature	126
Rule III, section 6	128
Temporary appointment	503
Vacancy, appointment	532
Vacancy, temporary appointment	503
 CIVIL SERVICE ACT	
Section 4	563, 577
Sections 4 and 6.....	223
Section 6	381, 567
Section 10	175, 563
Section 12	338

CLAIMS AGAINST CITY

Back salary, municipal employee	173
Defective sidewalk	406
Eckhart Milling Company, refund	401

CLAIMS AGAINST COUNTY

County prisoners, care and board of.....	479
--	-----

COAL

Contract for, change in shipping points.....	39
Inferior coal, rejection because	332

CONDEMNATION PROCEEDINGS

Damages	359
Judgment	359

CONSULS

Exemption, evidence	182
Municipal tax and license exemption.....	182
Ordinance	182

CONTRACTS

Acceptance, implied	332
Annulment	287
Appropriations, transfer	265
Award, discretion	635
Change of, effect upon sub-contractor.....	392
Default, provision in case of.....	190
Failure to complete, Commissioner of Public Works...	190
In excess of appropriations and extending beyond fiscal year	265
Payment	394
Performance, Commissioner of Public Works.....	638

CONVEYANCES

Easement	4
--------------------	---

COUNTY PRISONERS—See House of Correction

D

DAMAGES

"Daniel McCool" ship	457
Flooding of basement, City not liable.....	640
Hydrant lead blown off	247

DEDICATION

Assessor's plat	3
Common law dedication, essentials	3
Common law dedication, proof	3
Continued use, presumption	3
Easement by prescription	3

DISABILITY BENEFITS

Duty disability	154
Duty disability, doctor's report or certificate.....	184
Fire Department	108
Law governing	147
Ordinary disability and workmen's compensation award	154
Statute of limitations	147

DISABILITY PENSION

Proof	314
Resignation, withdrawal	314

DIVORCE

Remarriage	387
----------------------	-----

DOMESTIC INSURANCE COMPANIES

Annual statement, assessment	653
Personal property or capital stock, assessment.....	653
Return	653

E

ELEVATED RAILROADS

Structure, readjustment on account of viaduct, cost of	236
--	-----

ELEVATED STRUCTURE

Raising, cost of	468
Readjustment, cost	468

EMINENT DOMAIN—See Condemnation Proceedings

ENDURANCE CONTEST

Roller skating	448
----------------------	-----

ETTELSON'S MUNICIPAL CODE OF 1922

Article II, chapter 22	162
Article XXII, superseded	18
Chapter XXIX, article I	33
Section 96	242, 561
Section 176	408, 475
Section 177	476

Section 181	408
Section 193	408
Section 196	408
Section 202	93
Sections 202 to 210	331
Section 331	252
Section 403	78
Section 448-j	96
Section 899	72
Section 914a	642
Section 919a	642
Section 919c	642
Section 1020	38
Section 1026	38
Section 1155	186
Section 1195	186
Sections 1199, 1200	109
Section 1529	86
Section 1532	86, 246
Section 1538b	87
Section 1567	431
Section 1569	431
Section 1900	72
Section 2195	86
Section 2414A	343
Section 2414B	344
Section 2426	427
Section 2695	246
Sections 2785 to 2794	213
Section 3066	131
Section 3211	85
Section 3212	85
Section 3391	496
Section 3409	496
Section 3679	354
Section 4065	561
Section 4069	76
Section 4128	420
Section 4136	421, 436
Section 4157	571
Section 4159	573
Section 4160	574
Section 4161	574
Section 4179	426

F

FEDERAL AID ROADS	
Streets not a part of	396
FEDERAL HIGHWAY FUNDS	
Participation in	396
FENCES	
Barbed wire	349
FIRE DEPARTMENT—See Civil Service	
FIREMEN'S PENSION	
Board of trustees, Deputy Fire Commissioner not a member	186
Disability, retirement	645
FIREMEN'S PENSION FUND	
Board of trustees, delegation of power.....	186
FIREMEN'S PENSION FUND ACT	
Section 13	160
FOREIGN INSURANCE COMPANIES	
Net receipts, assessment	650
Net receipts, deductions	650
Net receipts, return	650
FOUND AND LOST GOODS	
Automobiles, disposition	325
FRONTAGE CONSENT	
City Council's action necessary, presumption.....	345
FUNDS—See Traction fund	
Bond funds, transfer	472
Donation or gift	404
Duplicate voucher, issuance	390
Investment, responsibility	341
License fees to be turned into City Treasury.....	240
Loaned from surplus fund	253
Mayor's contingent fund, street decorations.....	219
Receipts, right limited to authority conferred.....	401
Street decorations for conventions	219
Surplus funds, loans from	279
Transfer	347
Transfer from one Council committee to another.....	193

G

GAGE FARM	
Sale	600
GAMBLING	
Billiard skill non-gambling device	430
Football game is not	455
Gambling devices, test	455
Penny target practice and ball gum vender is gambling device	459
Play golf is not	455
GASOLINE TANK	
Installation, permit, extension	538
GENERAL WARRANTS ACT	
Section 3	558
GRAND JURY	
Pay checks, production before	217
Public documents, production before	217
GRANT PARK	
Dedicated portion, power of South Park Commissioners and City Council	52

H

HARBOR FUND	
Use of	136
HOUSE OF CORRECTION	
County prisoners, care and board of, refusal	479

I

ILLINOIS COMMERCE ACT	
Section 54	423
IMPROVEMENT BONDS	
Transfer to bearer	389
INSANITY	
Discharge from institution	150
INSPECTION	
Cold storage warehouses	18
Cooling plant	354
Illuminating bulletin or billboards	642
Inspectors, insufficient number of	240
Scales of railroads	423

J

JUUL LAW

Inapplicable to Lake Calumet Harbor tax.....	136
--	-----

L

LAKE CALUMET HARBOR

Tax rate not scalable	136
-----------------------------	-----

LAW DEPARTMENT

Questions handled, nature of	274
------------------------------------	-----

LICENSES

Amusement	475
Apex Club amusement license not necessary.....	475
Applicant, identification of	272
Application for license under assumed name, refund..	272
Bicycle race, fees	407
Cigarette license, application for	551
Cigarette license, vending machine	551
Issuance in violation of ordinance	575
Payment	427
Pool and billiard tables, Y. M. C. A.....	252
Receipt for fees confers no right to operate.....	343
Rescission, jurisdiction	318
Restaurants and hotels	93
Revocation	318
Revocation, personal liability	575
Undertakers'	71
Vehicle license, application	560
Vehicle license, fees, refund	74

LOCAL IMPROVEMENTS ACT

Section 56	44
------------------	----

LOST CHECK

Procedure, in case of	486
-----------------------------	-----

M

MANDAMUS

Special assessment, collection of by.....	359
---	-----

MECHANICS' LIEN

Notice	49
------------------	----

METER VAULTS

- Repair at City's expense 434

MOTION PICTURES

- Censor Board, mandamus, denial 213
Regulation, permit 213

MOTOR BUSES

- As feeders 300
Feeders, information necessary for ordinance..... 366
Operation ordinance, referendum 366
Regulation 300

MOTOR VEHICLE LAW

- Section 3 88

MOTOR VEHICLES

- Regulation 88

MUNICIPAL BONDS—See Bonds**MUNICIPAL CODE—See Ettelson's Municipal Code****MUNICIPAL CORPORATIONS**

- Loans of money to, liability..... 436

MUNICIPAL DEVICE

- Use of 38

MUNICIPAL EMPLOYEES

- Ordinary disability and workmen's compensation, payment 546
Pay check, endorsement 543
Pay check, loss of, liability..... 543
Pay check, nature 543

MUNICIPAL EMPLOYEES' ANNUITY AND BENEFIT FUND ACT

- Section 12 174
Section 48 154
Section 51 298

MUNICIPAL EMPLOYEES' ANNUITY AND BENEFIT FUND

- Refund 453

MUNICIPAL EMPLOYEES' PENSION

- Annuities 174
Child's annuity 414
Disability benefits, failure to distribute..... 614
Employee's standing and status..... 295

Leave of absence, several periods of.....	298
Pension and salary, payment	404
Service and credit rights, lay off period.....	462
Term of service, leave of absence.....	414
Transfer to different class of service.....	174
Trustees, temporary employment does not disqualify	295
MUNICIPAL FUND—See Funds	
MUNICIPAL INDEBTEDNESS	
Recommendation, acceptance	373
N	
NATIONAL DEFENSE ACT	
Act of June 3, 1916.....	121
NATIONAL GUARDSMEN	
Custody before trial	120
NAVY PIER	
Concessions	1
NUISANCE	
Abatement, Commissioner of Health	84
Complaint	84
Stone quarry, abandonment	245
O	
OATH OF OFFICE	
Administering	131
OFFICES AND OFFICERS	
Executive acts, appeal from	577
Legislative direction must be followed.....	287
Removal, nature of	577
OFFICIAL NEWSPAPER	
Chicago Journal of Commerce	484
ORDINANCES	
Amendment or suspension	44
Extension of franchise	300
Gravity warm air heating plants, inspectors.....	240

P

PARK COMMISSIONERS

Power, nature	52
---------------------	----

PARKS

Connecting streets, owner's consent	36
---	----

PATENT INFRINGEMENT

Indemnity bond, notice	259
------------------------------	-----

PAY CHECK—See Municipal Employees

PENSIONS

House of Correction, sale of old materials.....	269
Law governing	596, 601
Pension Board, construction of Pension Act, policy....	282
Pension Board, power, reinstatement of applicant....	314
Pension check, attorney in fact	26
Revocation	314
Widow's pension	387

POLICE BENEFITS

Discharge, annuity during	27
---------------------------------	----

POLICEMEN'S ANNUITY AND BENEFIT FUND ACT

Section 17	80, 99
Section 28	157
Section 31	356
Section 31, paragraph D	28
Section 37	81, 102
Section 55	356

POLICE PENSION

Adopted child, refund	612
Annuities, basis	156
Apportionment, death between two annuity payments..	156
Child	169
Child under 18	596
Child under 18 of widow who marries.....	648
Claims, statute of limitations	282
Deductions	80, 99
Present employee under 50 years of age.....	356
Refund	99
Theoretical deductions	80
Widow in 1915	601

POLICE PENSION ACT

Section 39	612
------------------	-----

POLICE PENSION FUND ACT OF 1887

Superseded	314
----------------------	-----

POLICE PENSION FUND ACT OF 1915

Superseded by Act of 1921.....	596
--------------------------------	-----

PUBLIC GARAGE

Construction and maintenance in Grant Park.....	52
---	----

PUBLIC PROPERTY

Temporary structures, permit	207
------------------------------------	-----

PUBLIC UTILITIES—See Elevated Structure

PUBLIC UTILITIES

Change of grade in streets, expenses of	133
---	-----

R

RAILROAD CROSSINGS

Subways	15
-------------------	----

RECEIPTS—See Funds

RECEIVERSHIP

Civil service employee's salary, payment to.....	656
Delinquent water bills, procedure	257
Vehicle license, transfer	74

REWARD

City Council, power to offer.....	592
Police official, when and when not entitled to.....	509
Posting	509

RIVER STRAIGHTENING ORDINANCE

Section 17, article V	111
Trustee's certificates, form	145
Trustee's certificates, interest	111

S

SCHOOL ACT

Section 132	559
-------------------	-----

SCHOOL TAX ANTICIPATION WARRANTS

Purchase of	436
Surplus funds statute	436

SEWAGE DISPOSAL

Contract for	249, 262
--------------------	----------

SEWAGE PUMPING STATION

Site, purchase, water fund	29
----------------------------------	----

SEWERS

Connection in annexed territory, jurisdiction.....	194
Public and private	194

SHERIDAN AND ARDMORE BEACH

Extension, permit	24
-------------------------	----

SPECIAL ASSESSMENTS

Bonds, issuance, pendency of suit	487
Collection, annexed territory	477
Collection, postponement	44
Improvement ordinance, repeal	364
Proceedings, dismissal or abandonment	44
Voucher, payment	482

STARS AND BADGES

Manufacture and sale	161
----------------------------	-----

STREETS

Changing fire alarm and police telegraph equipment in streets under Park Commissioners.....	489
City's right to	133
Federal or State aid	396
Girders or columns, removal or relocation.....	522
Haines street, vacating ordinance	233
Improvement, conforming to same, cost.....	489
Rearranging electric lights in streets under Park Commissioners	489
Traffic restrictions	351
Vacation, Alice Clark's subdivision	660
Vacation of plats, village trustees' consent unnecessary	660
Vacation ordinance, fixtures in street not included....	401
West 105th Place, water main	327

SUBWAYS

Appropriation for	200
Construction of	200
Lighting	15
Preliminary work, ordinance of 1928 invalid.....	199
Preliminary work, resolution	199
Railroad crossings	15
Traction fund	200

SUPPLEMENTAL APPROPRIATION

Passage of and its requirements.....	592
--------------------------------------	-----

SWITCHING TRACKS

Chicago, Great Western Railway Co.....	496
Regulation	496

T

TAX ANTICIPATION WARRANTS

Due date	539, 557
Extent of issue	279
Issue permissible	279
Issuance	436
Nature of	436
Sale below par	554

TAX LEVY ORDINANCE

Amendment	171
Requirements	171

TELEPHONE RATES

City Council, power	285
Service	285
Single message	285

TRACK ELEVATION

City Council, power to order.....	608
-----------------------------------	-----

TRACTION FUND

Investment of	306
Separation of, unnecessary	311

TRAFFIC ORDINANCE

Section 59	88
------------------	----

U

UNIFORM COLD STORAGE ACT

Supersedes Municipal Code	18
---------------------------------	----

V

VACANT LOTS

Cleaning	84
--------------------	----

VACATION PRIVILEGES

Skilled or unskilled employees	108
--------------------------------------	-----

VACATING ORDINANCE

Repeal	233
------------------	-----

VEHICLES—See Licenses

W

WAGE LOAN CORPORATION

Directors, appointment	474
------------------------------	-----

WATER CERTIFICATES

Ordinance	372
Payment	372

WATER FUND—See Sewage Pumping Station

WATER FUND

Obligations	372
Relocation of water tunnel	133
Water loan refunding bonds, payment.....	372
Water system, sale of water incidental.....	135

WATER MAINS

Tapping, permission	164
West 105th Place	327

WATER RATES

Accounts, nature of	570
Delinquent, nature	257
Tender, acceptance	570

WATER SYSTEM

Private water pipes, removal	164
Private water pipes, use	164
Water meter, installation, cost	420

WEIGHTS AND MEASURES ACT

Inspection of railroad scales	423
-------------------------------------	-----

WHITE PAVING COMPANY

Settlement ordinance	287
----------------------------	-----

WORDS AND PHRASES

Bridge	411
"Charitable organization"	252
"Corporate purpose"	277, 605
Corporate purpose, apportionment of State not.....	215
"Cost of installing"	420
"Dementia praecox"	150
"Department or other separate agency".....	193
"Extra clerk"	464
"Fireman"	159
"Furnish"	420

"Gross earnings"	269
"Hold over"	381
"Injury"	178
"Injury incurred in the performance of an act or acts of duty"	177
"Levy of a tax"	437
"Lowest responsible bidder"	635
"Park"	42
"Policemen"	131
Police power	531
Public place of amusement	93
Quasi-judicial acts	577
"Regulate"	219
"Retired"	314
"Surplus fund" origin	312
"Surplus funds"	311
"Tax levied by said City".....	436
"Temporary appointment"	174
Temporary clerk	464
"Total amount of any such tax levied".....	279
"While in the service"	159
WORKMEN'S COMPENSATION	
Payment	409

Z

ZONING

Commercial use, extension of	514
Limitations upon	167
Permit	167